

CUMULATIVE DIGEST

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§2-1

Right to

In re Henry B., 2015 IL App (1st) 142416 (No. 1-14-2416, 1/26/15)

In general, the Appellate Court has jurisdiction to review final judgements. However, it lacks jurisdiction to review an interlocutory order unless jurisdiction is afforded by Supreme Court rule. Two rules authorize appeals in juvenile cases. Rule 660(a) provides for appeals from final judgements, and Rule 662 allows an appeal from an interlocutory order where no dispositional order has been entered in 90 days.

The court concluded that where a continuance under supervision is ordered under 705 ILCS 405/5–615 without a finding of guilt or a judgement order, neither Rule 660(a) nor Rule 662 authorizes an appeal. Because the Appellate Court lacked jurisdiction, the appeal was dismissed.

In re Shatavia S., 403 Ill.App.3d 414, 934 N.E.2d 502, 2010 WL 3330897 (5th Dist. 2010)

Based on her admission, the court placed respondent on supervision for one year, with conditions of community service and restitution. 705 ILCS 405/5-615(a) allows a court to enter an order of continuance under supervision for certain offenses upon an admission by the minor and before proceeding to adjudication.

The Appellate Court rejected the State’s argument that there was no final judgment from which an appeal could be taken because the case was continued under supervision. The judgment appealed was not an adjudication of delinquency, but the conditions of supervision. Supreme Court Rule 604(b) authorizes an appeal from an order of supervision by a defendant who seeks review of the conditions of supervision.

(Respondent was represented by Assistant Defender Paige Strawn, Mt. Vernon.)

People v. Bozarth, 2015 IL App (5th) 130147 (No. 5-13-0147, 1/26/15)

The Illinois Constitution authorizes appeals in final judgements and permits the Supreme Court to provide for appeals of orders that are not final. Supreme Court Rule 604(b) provides that a defendant may appeal from an order of supervision and may seek review of the conditions of supervision, the finding of guilt, or both. Thus, the Appellate Court had jurisdiction to hear an appeal where after a stipulated bench trial defendant was sentenced to one year of court supervision.

(Defendant was represented by Assistant Defender Maggie Heim, Mt. Vernon.)

People v. Love, 2013 IL App (3d) 120113 (No. 3-12-0113, 9/24/13)

The Illinois Constitution prohibits appeals from nonfinal judgments but grants the Illinois Supreme Court the authority to provide for appeals to the Appellate Court from other than final judgments. Ill. Const. 1970, art. VI, §6. Supreme Court Rule 604(b) authorizes appeals from orders of supervision and allows a defendant to appeal “from the judgment and . . . conditions of supervision, or of the finding of guilt or the conditions of the sentence, or both.” Under this rule, defendant has the right to appeal both the finding of guilty and the conditions of supervision.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. McCaslin, 2014 IL App (2d) 130571 (No. 2-13-0571, 12/11/14)

1. A defendant has a constitutional right to appeal a criminal conviction, but may waive that right through neglect or by conscious choice. An agreement not to appeal should be

enforced unless the defendant can show that it was made involuntarily or unintelligently or suffers from some similar infirmity.

2. Defendant pleaded guilty to burglary and as part of the plea agreement was accepted into a drug-court program. The agreement provided that sentencing would be deferred until the successful completion of or unsuccessful discharge from the drug-court program. The plea agreement also stated that if the defendant “commits a new felony offense” the State would file a petition to discharge defendant from the program. As a condition of entering the program, defendant executed a document which stated: “I waive any and all rights to appeal I may have in the event I am dismissed from the [drug-court program] and understand and consent to the Court and . . . Drug Court Team being the sole authority for determining such dismissal.”

The State subsequently filed a petition to terminate defendant’s participation in the drug-court program, alleging that he had been charged with a felony in another county. At the hearing on the petition, defendant argued that the State was required to show that he had committed a new felony, not merely that he had been charged. The trial court granted the petition to terminate, and defendant appealed.

The Appellate Court dismissed the appeal, finding that defendant had waived his right to appeal and agreed that the trial court and drug-court team would determine whether he should be dismissed from the program. Furthermore, the record showed that the waiver of the right to appeal was voluntary and intelligent where the trial court ascertained that defendant understood the agreement and defense counsel indicated that he had discussed the agreement with defendant. The court rejected the argument that the trial court was required to specifically admonish a defendant who waives his appellate rights, noting that Illinois Supreme Court Rule 402, which specifies the admonishments to be given before accepting a guilty plea, does not require any specific admonishment concerning a waiver of the right to appeal.

3. In a concurring opinion, Justice Jorgensen agreed that defendant waived his appellate rights but stated that “such sweeping waivers can have a detrimental effect on the integrity and sustainability of drug-court programs.” Justice Jorgensen criticized the use of waivers of appellate rights as occurred in this case because drug-court programs are afforded “virtually unfettered authority” to terminate participants from the program without permitting any challenge to the State’s failure to prove that the agreement has been violated.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

People v. Reid, 2014 IL App (3rd) 130296 (No. 3-13-0296, 12/15/14)

After he was convicted of first degree murder, defendant agreed to waive his right to appeal and his right to file a post-conviction petition. In return, the State agreed to not seek a death sentence. Defendant subsequently filed a direct appeal, which the Appellate Court heard after finding that the trial court had given improper admonishments regarding the waiver of appellate rights.

Defendant then filed a post-conviction petition which was dismissed as frivolous and patently without merit. The Appellate Court affirmed the dismissal order, holding that defendant had been properly admonished concerning the waiver of his right to file a post-conviction petition.

1. Because a waiver of the right to appeal resembles a guilty plea, before accepting such a waiver the trial court must admonish defendant under Supreme Court Rule 605. However, because no specific admonishments are prescribed by statute or rule, the validity of a waiver of the right to file a post-conviction petition is determined under general constitutional

standards. Thus, a waiver of the right to file a post-conviction petition is valid if it represents an intelligent and voluntary relinquishment of a known right.

2. The court concluded that defendant's waiver of his right to pursue post-conviction relief was knowing and voluntary where the trial court explained in open court that defendant had the right to seek post-conviction relief, explained that post-conviction proceedings would occur after the direct appeal was complete, and stated that agreeing to the waiver would mean that defendant "could take no further legal action" to challenge his conviction. The court found that the trial judge was not required to discuss the specific process of post-conviction proceedings, including the standard to be applied at first-stage proceedings and the right to receive a free transcript.

Because defendant's waiver of post-conviction proceedings was proper and could be enforced, the trial court's order denying the petition as frivolous was affirmed.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Sims, 403 Ill.App.3d 9, 931 N.E.2d 1220 (1st Dist. 2010)

The Appellate Court dismissed defendant's direct appeal of his conviction in March 1993 due to the failure of his counsel to file the record on appeal. In September 1993, defendant's attorney signed for and received the common law record. Defendant learned in November 1994 that his appeal had been dismissed. In 1996, defendant filed a *pro se* motion to reinstate his appeal in the Appellate Court and a *pro se* motion to file a late notice of appeal in the Supreme Court. Both motions were denied. In 2006, defendant filed a *pro se* post-conviction petition, which ultimately led to his being permitted to file a late notice of appeal in 2009. At that point, the common law record and jury selection proceedings could not be located or reconstructed.

1. As a general rule, a defendant is obligated to provide a complete record for review of his appellate claims. This rule is relaxed where defendant is not at fault for the incompleteness and the missing record is material to meaningful review of his contentions on appeal. Defendant contended he was denied his right to meaningful appellate review where through no fault of his own the record on appeal was incomplete. The Appellate Court acknowledged that the incompleteness of the record was not the fault of the defendant and that the missing records could not be reconstructed. It denied any relief to defendant because he had not established that the missing records were material to meaningful review of his appeal. Defendant could not identify any specific error that occurred in the missing records. It was not enough that as a result of the missing record it could not be determined whether or not an error occurred.

2. Delay of an appeal can violate due process. To determine whether delay violates due process, courts utilize the four-part test of **Barker v. Wingo**, 407 U.S. 514 (1972), designed to address violations of defendant's Sixth Amendment right to a speedy trial. Those factors are: (1) length of the delay; (2) reason for the delay; (3) defendant's responsibility to assert his right; and (4) the resulting prejudice to defendant. Applying these factors, the court found no violation of defendant's right to due process. The court acknowledged that the 17-year delay did merit further inquiry and the initial delay of the appeal was due to ineffective assistance of counsel. But the court also found that defendant was responsible for the delay from 1994 when defendant learned the appeal was dismissed, until 1996, when he filed *pro se* motions. The record was silent as to any action taken by defendant from 1996 until 1999, and from 2000 until 2006, during which times he took no action. Moreover, defendant suffered no prejudice. The loss of records did not interfere with meaningful appellate review of his conviction, and defendant endured no unlawful incarceration, as the court concluded no error occurred at his

trial.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

People v. Utsinger, 2013 IL App (3d) 110536 (No. 3-11-0536, 5/30/13)

Supreme Court Rule 604(b), entitled “Appeals When Defendant Placed Under Supervision or Sentenced to Probation, Conditional Discharge or Periodic Imprisonment,” provides in relevant part: “A defendant who has been placed under supervision or found guilty and sentenced to probation or conditional discharge *** may appeal from the judgment and may seek review of the conditions of supervision, or of the finding of guilt, or the conditions of the sentence, or both.”

This rule explicitly states that a defendant placed under court supervision may seek review of the conditions of supervision or of the finding of guilt that precedes the order of supervision. The Appellate Court rejected, as contrary to the plain language of the rule, the argument that because an order of supervision is not a “sentence” as defined by 730 ILCS 5/5-1-19 (a disposition imposed on a convicted defendant), an offender receiving supervision based on a finding of guilt may not appeal that finding unless defendant violates supervision, resulting in a conviction. This “impractical interpretation” would require a defendant to refuse supervision after a finding of guilt in order to preserve his right to review a finding of guilt. Given the select number of offenders eligible for supervision, the court did not believe that the Illinois Supreme Court by adopting Rule 604(b) intended that those persons be denied access to appellate review of trial court errors.

(Defendant was represented by former Assistant Defender Melissa Maye, Ottawa.)

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§2-2

Notice of Appeal

§2-2(a)

Generally

People v. Bailey, 2014 IL 115459 (No. 115459, 2/6/14)

1. Under the reversion doctrine, a court may regain jurisdiction after the time for filing a post-judgment challenge has expired. The reversion doctrine applies where the parties actively participate, without objection, in proceedings which are inconsistent with the merits of an earlier judgment.

The reversion doctrine is interpreted narrowly, and may apply if both parties seek to modify or overturn the prior judgment. However, the doctrine is inapplicable where a party opposes modification of the existing judgment, even if that party failed to object to the timeliness of a late challenge.

2. The reversion doctrine did not apply here. Although the State failed to object on timeliness grounds when defendant moved to vacate his plea more than three years after the plea was entered, it actively opposed any modification of the conviction and sentence. The court stated that the State’s “attempt to defend the merits of the prior judgment cannot be viewed as being inconsistent with that judgment.”

Because the State opposed the motion to withdraw the plea, it did not assert a position that was inconsistent with the merits of the prior judgment. Because the criteria for the

revestment doctrine was not satisfied, the trial court should have dismissed the motion to withdraw the plea instead of considering it on the merits.

3. The court added that the Appellate Court erred by dismissing the appeal for lack of jurisdiction, because that order left intact the trial court's improper exercise of jurisdiction. Once the Appellate Court found that it lacked jurisdiction to consider the appeal, it should have vacated the trial court's judgment and ordered that the motion to withdraw the plea be dismissed.

4. The court rejected the State's argument that the revestment doctrine should be abolished in criminal cases because it conflicts with the need for finality in judgments and the rule establishing deadlines for filing jurisdictional post-judgment motions. The court found that the doctrine, which has been applied in criminal cases since at least 1983, should not be abolished in the absence of a demonstration of good cause or the identification of compelling reasons. "The inherent conflict between a rule and its exception does not meet that high standard."

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Lewis, 234 Ill.2d 32, 912 N.E.2d 1220 (2009)

In a non-death case, the timely filing of a notice of appeal is the sole jurisdictional step required to initiate appellate review. The purpose of the notice of appeal is to inform the prevailing party that the other party seeks review, and to provide notice of the subject of the appeal. In **People v. Smith**, 228 Ill.2d 95, 885 N.E.2d 1053 (2008), the court concluded that a notice of appeal which specifically mentioned a different judgment than that which the defendant sought to appeal was insufficient to provide notice to the State of the judgment being appealed, or to afford jurisdiction to the reviewing court.

Here, a notice of appeal which stated that defendant was appealing from his conviction was sufficient although it specifically listed only the date on which defendant's motion to suppress was denied. Because the notice stated that defendant was appealing his conviction, and a defendant is not allowed to appeal only from a denial of a suppression motion, the State could not have reasonably believed that defendant was attempting to appeal the suppression ruling. (See also, **NARCOTICS**, §35-4 & **WAIVER – PLAIN ERROR – HARMLESS ERROR**, §§56-2(a), (b)(5)).

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

People v. Patrick, 2011 IL 111666 (No. 111666, 12/30/11)

1. A timely filing of a notice of appeal is the only jurisdictional step for initiating appellate review. The purpose of the notice of appeal is to notify the prevailing party that the opposing party seeks review of the circuit court's judgment. The notice of appeal confers jurisdiction to consider only the judgments or parts thereof that are specified in the notice. A notice of appeal should be considered as a whole, however, and is sufficient to confer jurisdiction when it fairly and adequately sets out the judgment complained of and the relief sought in a way that makes the opposing party aware of the nature of the appeal.

2. The court held that both notices of appeal filed in this case were sufficient to afford jurisdiction for the Appellate Court to review the trial court's order concerning defendant's post-trial, *pro se* motions raising allegations of ineffective assistance of counsel. Defense counsel filed a notice of appeal on the day the trial court denied a motion to reconsider the sentence, which was after the trial court held that defendant's *pro se* allegations were untimely. That notice of appeal listed the date of judgment as the date the motion to reconsider was denied, and identified the offenses and sentences imposed. Thus, it indicated

that defendant was appealing from the judgment of conviction.

In addition, the circuit court clerk had filed a notice of appeal some ten weeks earlier, on the date of sentencing. That notice listed the date of sentencing as the judgement date and listed the offenses and sentences. In addition, it left blank the heading; “If appeal is not from a conviction, nature of Order appealed from.” The court found that this notice of appeal indicated that defendant was appealing from his conviction.

The court concluded that even if there was confusion due to the conflicting dates in the notices of appeal, the State had adequate notice that defendant sought to review his conviction. Furthermore, the failure to comply strictly with the proper form of a notice of appeal is not fatal if the deficiency is one of form rather than substance and there is no prejudice to the appellee. The State did not argue that it was prejudiced by any confusion in the notices of appeal, and it did not appear that any prejudice occurred.

The court did not discuss whether the first notice of appeal was void under Supreme Court Rule 606(b), which states that a notice of appeal filed before timely post-trial motions are filed has no effect. Here, defense counsel filed a timely motion to reconsider the sentence after the circuit clerk filed the first notice of appeal.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

In re Isiah D., 2105 IL App (1st) 143507 (No. 1-14-3507, 6/8/15)

On appeal from a 2014 order finding him to be a habitual juvenile offender and a violent juvenile offender, the minor respondent argued that the conviction resulting from his guilty plea in 2013 could not be used as a predicate for HJO and VJO status because the plea admonishments had been improper. The court concluded that under **In re J.T.**, 221 Ill.2d 338, 851 N.E.2d 1 (2006), it lacked jurisdiction to consider issues arising from the 2013 plea because respondent failed to file a timely appeal from that proceeding. The court concluded that **J.T.** implicitly overruled **In re J.W.**, 164 Ill.App.3d 826, 518 N.E.2d 310 (1st Dist. 1987), which found that the Appellate Court had jurisdiction to consider the propriety of a prior guilty plea that was used as a predicate in a subsequent case.

The court noted that because minors have not been held to come within the Post-Conviction Hearing Act, respondent was effectively left without a remedy unless the Supreme Court saw fit to exercise supervisory authority.

(Respondent was represented by Assistant Defender Kathleen Weck, Chicago.)

People v. Decaluwe, 405 Ill.App.3d 256, 938 N.E.2d 181 (1st Dist. 2010)

A notice of appeal is sufficient to confer jurisdiction on the Appellate Court when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the appeal. A notice of appeal should be liberally construed and considered as a whole.

The notice of appeal listed two of defendant’s convictions, but not the third from which defendant also sought to appeal. A strict construction of Supreme Court Rule 606(d) would require that all three be listed. Defendant left the line blank following the language, “If appeal is not from a conviction, nature of order appealed from.” This indicated defendant’s intent to appeal from all of the convictions, not just the two identified on the notice of appeal. The State never contested the sufficiency of the notice of appeal. Construing the notice of appeal liberally and as a whole, it was sufficient to confer jurisdiction on the Appellate Court.

(Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

People v. Mutesha, 2012 IL App (2d) 110059 (No. 2-11-0059, 11/19/12)

Although the filing of a notice of appeal vests jurisdiction in the Appellate Court, the trial court retains jurisdiction to decide matters that are independent of and collateral to the judgment on appeal. Collateral or supplemental matters include those lying outside the issues on appeal or arising subsequent to delivery of the judgment appealed from. Review of whether a trial court properly exercised jurisdiction is *de novo*.

Before the court ruled on defendant's post-trial motion and conducted a sentencing hearing, defendant was found unfit to be sentenced. He appealed from that finding. While the fitness appeal was pending, defendant was restored to fitness. The court then proceeded to deny the post-trial motion and impose sentence. Defendant appealed his conviction and sentence.

Hearings to reexamine fitness are provided by statute at maximum intervals of 90 days where a defendant is expected to become fit with treatment. 725 ILCS 5/104-20(a). Because the judgment restoring defendant to fitness was based on new facts, it was independent of and collateral to the judgment on appeal, and the trial court retained jurisdiction to hear and decide the matter.

The trial court did not have jurisdiction, however, to rule on defendant's post-trial motion and impose sentence after he was restored to fitness while the appeal from the finding that he was unfit was pending. Both the post-trial motion and the sentencing hearing were central issues in the criminal matter and were not collateral to the fitness appeal. The orders denying the post-trial motion and sentencing the defendant were therefore void. If the defendant wished to obtain a ruling on his post-trial motion and be sentenced immediately upon his restoration of fitness, he should have first moved to dismiss his pending fitness appeal.

The Appellate Court vacated the order denying the post-trial motion as well as defendant's sentence, and dismissed defendant's appeal.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

People v. Salcedo, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-3148, 6/9/11)

1. Unless a timely post-judgment motion is filed, the trial court loses jurisdiction 30 days after final judgment is entered. In a criminal case, the sentence is the final judgment. Thus, the trial court retains jurisdiction only if the defendant files a motion to reconsider the sentence or a notice of appeal within 30 days of sentencing.

2. Without deciding whether the trial court has authority to grant an extension of time in which to file a post-sentencing motion, the court found that the motion which the judge granted was merely a continuance of the hearing on such a motion, if one was timely filed. The court noted that defense counsel's motion stated that because he was involved in another trial, he would be unavailable for "any evidentiary trial or hearing."

3. The court concluded, however, that the parties revested the trial court with jurisdiction to consider an untimely post-sentencing motion. Under the revestment doctrine, parties revest the trial court with personal and subject matter jurisdiction by actively participating in proceedings which are inconsistent with the merits of a prior judgment. Conduct is deemed inconsistent with a prior judgment where it could be construed as an indication that the parties do not view the prior judgment as final and binding. Active participation, rather than mere consent, is required to revest jurisdiction.

If jurisdiction is revested in the trial court, the filing of a notice of appeal within 30 days after the ruling on an untimely post-judgment motion vests the Appellate Court with jurisdiction.

Here, the State revested the trial court with jurisdiction when it affirmatively argued

that defendant's untimely motion to reconsider the sentence should be denied on its merits. "By participating rather than objecting to the hearing, the State essentially acknowledged that the previous sentencing judgment should be revisited." The court rejected the argument that jurisdiction is revested only where both parties specifically seek to set aside the judgment; the revestment doctrine applies where a party challenges a prior judgment and the opposing party acts in a manner that is inconsistent with the final and binding nature of that judgment.

Defendant's convictions for first degree murder and aggravated battery with a firearm were affirmed.

(Defendant was represented by Assistant Defender Michael Soukup, Chicago.)

People v. Stevenson, 2011 IL App (1st) 093413 (No. 1-09-3413, 11/4/11)

Supreme Court Rule 606(b) provides that "[w]hen a timely posttrial or postsentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court," and a "new notice of appeal must be filed within 30 days following the entry of the order disposing of all timely filed postjudgment motions."

Defendant mailed a *pro se* motion to reconsider sentence from prison on the same date that the court denied trial counsel's timely-filed motion to reconsider sentence and that trial counsel filed a notice of appeal. The *pro se* motion raised the same issue raised in trial counsel's motion. The circuit court denied the *pro se* motion 18 months later, after defendant's appellate counsel had the motion placed on the circuit court's call for a ruling. The Appellate Court concluded for the following reasons that the *pro se* motion did not void the notice of appeal previously filed by counsel pursuant to Rule 606(b), and therefore it did not have jurisdiction to hear an appeal from the denial of that motion.

1. Defendant had no right to file a *pro se* post-sentencing motion. With the exception of post-trial motions alleging ineffective assistance of trial counsel, defendants represented by counsel have no authority to file *pro se* motions and the court should not consider such motions. The Appellate Court concluded that the record refuted that the trial court exercised its discretion to permit hybrid representation during the post-trial proceedings. Defendant never made a clear statement to the court that he wanted to proceed *pro se*, and the trial court informed defendant numerous times following the denial of his post-trial motion alleging trial counsel's ineffectiveness that he was represented by counsel and could not file any further *pro se* post-trial motions. The Appellate Court also rejected the argument that defendant was not represented by counsel at the time he filed his *pro se* motion as there was no indication in the record that trial counsel had asked for leave to withdraw.

2. Even assuming that defendant did have the right to file a *pro se* motion, the plain language of Rule 606(b) contemplates the filing of only one post-judgment motion directed against the conviction or the sentence or both. It does not authorize the filing of successive and repetitious motions that raise issues that were or could have been raised earlier and thereby extend the time for appeal.

3. Even if the trial court could be required to rule on a successive motion, defendant's *pro se* motion was not properly filed because no notice accompanied the motion that would have brought the motion to the attention of the trial court within a reasonable time. At the time that defendant filed his motion, 730 ILCS 5/5-8-1(c) provided that a post-sentencing motion would not be deemed timely filed "unless it is filed with the circuit court clerk within 30 days after the sentence is imposed together with a notice of motion, which notice shall set the motion on the court's calendar on a date certain within a reasonable time after the date

of filing.” The tolling provisions of Rule 606(b) were not triggered by the filing of the *pro se* motion due to defendant’s failure to comply with this notice requirement.

4. Litigants may revest a court that has general jurisdiction over the matter with personal and subject matter jurisdiction after it has been lost if they actively participate without objection in further proceedings that are inconsistent with the merits of the prior judgment. The revestment doctrine did not apply in this case because the parties cannot divest the Appellate Court of jurisdiction it obtained with the filing of a notice of appeal and a certificate in lieu of record. Moreover, although the State did not object to the circuit court’s jurisdiction to rule on the *pro se* motion, neither was its conduct inconsistent with the merits of the final judgment as the State defended the validity of the sentencing proceedings.

Although the notice of appeal filed by trial counsel following denial of his motion to reconsider did properly perfect an appeal from defendant’s conviction, that appeal was dismissed on appellate counsel’s motion, and the Appellate Court had lost jurisdiction to reinstate that appeal due to the passage of time.

(Defendant was represented by Assistant Defender Lindsey Anderson, Chicago.)

People v. Thomas, 402 Ill.App.3d 1129, 932 N.E.2d 658 (5th Dist. 2010)

In **People v. Morris**, 236 Ill.2d 345, 925 N.E.2d 1069 (2010), the Supreme Court held that **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), does not apply retroactively to convictions which became final before December 20, 2005, the date on which **Whitfield** was announced. Here, the court held that the conviction in defendant’s case became final on November 15, 2005, when consecutive sentences were entered on a guilty plea which had been entered a week earlier.

Although a timely motion directed at the plea or to reconsider the sentence would have delayed entry of a final judgment, a letter which the defendant wrote to the judge did not constitute such a motion. Because the letter merely pointed out that under the plea agreement the sentences were to run concurrently, it was the equivalent of a motion to correct the mittimus. Correcting the mittimus is merely a ministerial act which does not toll the entry of a final judgement.

Because defendant’s conviction was final before December 20, 2005, the **Whitfield** rule did not apply.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

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§2-2(b)

Timeliness

In re Commitment of Hernandez, 239 Ill.2d 195, 940 N.E.2d 1082 (2010)

The respondent was adjudicated sexually dangerous in 2004. In 2007, the trial court granted conditional release and ordered the Department of Human Services to submit a conditional release plan. The State filed a notice of appeal after the trial court granted conditional release but before the trial court approved the conditional release plan.

The Appellate Court found that the notice of appeal was untimely because it was filed before the judgement was final. The State appealed. The Supreme Court found that the issue was moot because while the cause was on appeal, the trial court had revoked conditional release.

1. An appeal is moot when intervening events make it impossible for a reviewing court to grant effective relief. Because the State had already received the relief it sought - the return of the respondent to the custody of DHS - any opinion which the court might enter would be purely advisory. Thus, the issue was moot.

2. The public interest exception to the mootness doctrine allows a reviewing court to consider a moot issue where there is a clear showing that the question is of a substantial public nature, an authoritative determination is needed to guide lower courts and the bar, and the issue is likely to recur. In determining whether an authoritative determination is needed, the court examines whether the law is in disarray or there is conflicting precedent.

If any of the three factors are absent, the public interest exception is inapplicable. The court concluded that the State could not establish the second factor – that an authoritative determination was required - because the Appellate Court’s holding was based on well-settled law concerning the finality of judgements, there was no conflicting precedent, and the State could not direct the court to any Illinois case which had adopted the rule it sought in this case. Furthermore, there was *no* precedent in Illinois on the narrow issue of the timeliness of the notice of appeal in a sexually dangerous person case; instead of issuing an opinion as a matter of first impression, the Appellate Court should have dismissed the appeal as moot because the respondent’s conditional release had been revoked by the time the Appellate Court considered the case.

The Appellate Court’s judgment was vacated and the appeal dismissed.

People v. Bailey, 2014 IL 115459 (No. 115459, 2/6/14)

1. Under the reversion doctrine, a court may regain jurisdiction after the time for filing a post-judgment challenge has expired. The reversion doctrine applies where the parties actively participate, without objection, in proceedings which are inconsistent with the merits of an earlier judgment.

The reversion doctrine is interpreted narrowly, and may apply if both parties seek to modify or overturn the prior judgment. However, the doctrine is inapplicable where a party opposes modification of the existing judgement, even if that party failed to object to the timeliness of a late challenge.

2. The reversion doctrine did not apply here. Although the State failed to object on timeliness grounds when defendant moved to vacate his plea more than three years after the plea was entered, it actively opposed any modification of the conviction and sentence. The court stated that the State’s “attempt to defend the merits of the prior judgment cannot be viewed as being inconsistent with that judgment.”

Because the State opposed the motion to withdraw the plea, it did not assert a position that was inconsistent with the merits of the prior judgment. Because the criteria for the reversion doctrine was not satisfied, the trial court should have dismissed the motion to withdraw the plea instead of considering it on the merits.

3. The court added that the Appellate Court erred by dismissing the appeal for lack of jurisdiction, because that order left intact the trial court’s improper exercise of jurisdiction. Once the Appellate Court found that it lacked jurisdiction to consider the appeal, it should have vacated the trial court’s judgment and ordered that the motion to withdraw the plea be dismissed.

4. The court rejected the State’s argument that the reversion doctrine should be abolished in criminal cases because it conflicts with the need for finality in judgements and the rule establishing deadlines for filing jurisdictional post-judgment motions. The court found that the doctrine, which has been applied in criminal cases since at least 1983, should not be

abolished in the absence of a demonstration of good cause or the identification of compelling reasons. “The inherent conflict between a rule and its exception does not meet that high standard.”

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Bridgewater, 235 Ill.2d 85, 918 N.E.2d 553 (2009)

Under **People v. Marker**, 233 Ill.2d 158, 908 N.E.2d 16 (2009), the State’s motion to reconsider an order granting a motion to suppress tolls the time for filing an interlocutory appeal. Because the State filed a timely motion to reconsider the trial court’s suppression order, and when that motion was denied filed a timely notice of appeal, the Appellate Court had jurisdiction to consider the State’s appeal. (See also, **SEARCH & SEIZURE**, §§45-12, 45-13).

(Defendant was represented by Assistant Defender Fletcher Hamill, Ottawa.)

In re Christopher P., 2012 IL App (4th) 100902 (No. 4-10-0902, 9/12/12)

1. An issue on appeal becomes moot where events occurring after the filing of the appeal render it impossible for the reviewing court to grant effectual relief to the complaining party. Generally, a reviewing court will not resolve a moot question solely to establish precedent or govern future litigation.

A moot issue can be addressed under the public-interest exception, which requires: (1) the existence of a question of public importance; (2) the desirability of an authoritative determination for the purpose of guiding public officers in the performance of their duties; and (3) the likelihood that the question will recur. The existence of conflicting authority is not a requirement of the public-interest exception.

The Appellate Court concluded that the question of whether sentencing credit was available for a county treatment program for delinquent minors could be reached even though the issue was moot. The issue of sentencing credit is undeniably a question of public importance. The issue is likely to recur if county public officials believe that the program does not qualify for sentencing credit. Even though the issue is one of first impression, an authoritative determination to guide public officers is desirable.

2. When no direct appeal is taken from an order of probation, and the time for appeal has expired, a reviewing court is precluded from reviewing the propriety of that order in an appeal from a subsequent revocation of probation, unless the underlying judgment of conviction is void.

Respondent appealed from an order denying him sentencing credit upon his commitment to the Department of Juvenile Justice following revocation of probation. Because this order was entered when a new sentence was imposed upon revocation of probation, and the appeal from the resentencing order was timely filed, the Appellate Court had jurisdiction to consider the issue.

(Respondent was represented by Assistant Defender Jacqueline Bullard, Springfield.)

In re Darius L., 2012 IL App (4th) 120035 (No. 4-12-0035, 9/12/12)

1. An issue on appeal becomes moot where events occurring after the filing of the appeal render it impossible for the reviewing court to grant effectual relief to the complaining party. Generally, a reviewing court will not resolve a moot question solely to establish precedent or govern future litigation.

A moot issue can be addressed under the public-interest exception, which requires: (1) the existence of a question of public importance; (2) the desirability of an authoritative

determination for the purpose of guiding public officers in the performance of their duties; and (3) the likelihood that the question will recur. The existence of conflicting authority is not a requirement of the public-interest exception.

The Appellate Court concluded that the question of whether sentencing credit was available for a county treatment program for delinquent minors could be reached even though the issue was moot. The issue of sentencing credit is undeniably a question of public importance. The issue is likely to recur if county public officials believe that the program does not qualify for sentencing credit. Even though the issue is one of first impression, an authoritative determination to guide public officers is desirable.

2. When no direct appeal is taken from an order of probation, and the time for appeal has expired, a reviewing court is precluded from reviewing the propriety of that order in an appeal from a subsequent revocation of probation, unless the underlying judgment of conviction is void.

Respondent appealed from an order denying him sentencing credit upon his commitment to the Department of Juvenile Justice following revocation of probation. Because this order was entered when a new sentence was imposed upon revocation of probation, and the appeal from the resentencing order was timely filed, the Appellate Court had jurisdiction to consider the issue.

(Respondent was represented by Assistant Defender Jacqueline Bullard, Springfield.)

In re Henry P., 2014 IL App (1st) 130241 (No. 1-13-0241, 5/30/14)

Since defendant did not file a notice of appeal within 30 days of the final judgment, the Appellate Court did not have jurisdiction to consider her claim that the Juvenile Court Act's minimum mandatory sentence of five years' probation violated the equal protection clause.

The court rejected defendant's argument that it had jurisdiction to review her claim because it involved a constitutional attack on a statute which, if successful, would render the underlying judgment void. Although a void judgment may be attacked at any time, a judgment is void only where the court that entered the judgment lacked jurisdiction. Even if the Juvenile Court Act violated equal protection, the probation order was entered by a court of competent jurisdiction, and hence the order was merely voidable, not void.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

People v. Bailey, 2012 IL App (2d) 110209 (No. 2-11-0209, 12/10/12)

Absent a timely postjudgment motion, a circuit court loses jurisdiction to vacate or modify its judgment 30 days after its entry. Under the revestment doctrine, the parties may revest the circuit court with jurisdiction after the 30-day period has run when the parties (1) without objection, (2) actively participate, and (3) in further proceedings inconsistent with the merits of the prior judgment. A party's participation in the proceedings is not inconsistent with the merits of the prior judgment when the party advocates that the court deny the motion and uphold the court's judgment.

More than three years after he was sentenced, defendant filed a motion to vacate his guilty plea and sentence. The State did not object to the untimeliness of the motion, and actively participated in the proceedings on the postplea motion. But the State argued against the defense motion on its merits and did not agree that the judgment be vacated.

Because the post-plea motion was not timely, it did not toll the 30-day post-judgment period for filing a notice of appeal. The parties did not revest the circuit court with jurisdiction because the State's opposition to the motion was not inconsistent with the merits of the prior judgment. Therefore, the notice of appeal filed by the defendant within 30 days of the denial

of the postplea motion was untimely and did not confer jurisdiction on the Appellate Court.

McLauren, J., dissented. The State's failure to object to the untimeliness of the motion meant that it addressed the merits of the motion and proceeded in contravention to the obvious merit of the finality of the judgment. The revestment doctrine does not require that a party stand on finality alone in order to prevent revestment, but it does require a party to raise the issues of untimeliness and the circuit court's lack of jurisdiction in order to prevent revestment.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Feldman, 409 Ill.App.3d 1124, 948 N.E.2d 1094 (5th Dist. 2011)

Where a defendant may not appeal without first filing a motion to withdraw guilty plea, it is the order denying the motion that is the final judgment. The filing of a timely motion to reconsider that judgment does not run afoul of the general rule against the filing of successive postjudgment motions, and provides the trial court the opportunity to correct any errors resulting from the denial of the motion to withdraw. A notice of appeal filed within 30 days of the denial of the motion to reconsider is timely filed.

(Defendant was represented by Assistant Defender Dan Evers, Mt. Vernon.)

People v. Hughes, 2011 IL App (2d) 090992 (No. 2-09-0992, 7/19/11)

1. Defendant's guilty plea was not void although the count to which he pled had been *nolle prossed* by the prosecution some six years earlier, when the State sought to have defendant declared sexually dangerous. Although the trial court has no jurisdiction over a dismissed charge and the State is generally required to file a new charging instrument in order to reinstate a prosecution, under the revestment doctrine litigants may revest a court which has general jurisdiction with both personal and subject matter jurisdiction.

To revest jurisdiction, the parties must actively participate without objection in proceedings which are inconsistent with the merits of the prior judgment. Revestment depends not on the consent of the parties, but on their active participation in certain proceedings.

2. The court concluded that the revestment doctrine applied where the parties reached an agreement by which the trial court was to vacate its previous dismissal of the charges, defendant was to plead guilty to one count and receive a 14-year-sentence, and the State was to withdraw the petition under which defendant had been adjudicated sexually dangerous. By presenting the agreement, the parties clearly participated in proceedings that were inconsistent with the prior dismissal of the charges.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. Lane, 2011 IL App (3d) 080858 (No. 3-08-0858, mod. op. 7/18/11)

A court loses jurisdiction to modify its judgment 30 days after entry of the judgment unless a timely post-judgment motion is filed. The parties may revest the court with jurisdiction where the parties actively participate without objection in further proceedings that are inconsistent with the merits of the prior judgment.

Defendant filed a motion to reduce his sentence after more than 30 days had elapsed since the date that he was sentenced *in absentia*. The trial court was revested with jurisdiction where the prosecutor did not object to the motion even after the court expressed concern that the motion was untimely, and instead argued the merits of the motion to reduce sentence.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Lane, 404 Ill.App.3d 254, 935 N.E.2d 578 (3d Dist. 2010)

A court loses jurisdiction to modify its judgment 30 days after entry of the judgment unless a timely post-judgment motion is filed. The parties may revest the court with jurisdiction where the parties actively participate without objection in further proceedings that are inconsistent with the merits of the prior judgment.

Defendant filed a motion to reduce his sentence after more than 30 days had elapsed since the date that he was sentenced *in absentia*. The trial court was revested with jurisdiction where the prosecutor did not object to the motion even after the court expressed concern that the motion was untimely, and argued the merits of the motion to reduce sentence.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Lugo, 391 Ill.App.3d 995, 910 N.E.2d 767 (2d Dist. 2009)

1. Under Supreme Court Rule 373, a pleading received after the due date is deemed to have been filed at the time of mailing. Proof of the date of mailing “shall” be made as provided by Rule 12(b)(3).

Rule 12(b)(3) provides that for service by mail, proof of service is made by the certificate of an attorney or the affidavit of a non-attorney, stating the identity of the person who deposited the paper in the mail, the time and place of mailing, the complete address on the envelope, and that proper postage was prepaid. Rule 373 applies to the filing of a notice of appeal in the trial court.

2. A postmarked envelope taped to the back of the notice of appeal was not an affidavit by a person other than an attorney, as contemplated by Rule 12(b)(3). The court noted that Rule 373 at one time specifically authorized the use of postmarks as proof of mailing, but that authorization was removed by the Supreme Court in 1981 due to problems with legibility and questions about delay in affixing postmarks.

The court noted, however, that an incarcerated indigent defendant generally mails documents by giving them to prison staff, not by personally mailing them. In this case, the court was not called on to decide “[w]hether an incarcerated litigant’s documents are considered mailed” when given to prison staff or only when placed in a mailbox, or whether Rule 12 requires the affidavit of the defendant or of the person who physically placed the document in the mail.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. Maclin, 2013 IL App (1st) 110342 (No. 1–11–0342, 12/16/13)

The Appellate Court found that it lacked jurisdiction to consider defendant’s post-conviction appeal.

Under Illinois Supreme Court Rule 606, a notice of appeal in a criminal case must be filed with the clerk of the circuit court within 30 days after final judgment is entered. Rule 651 provides that appeals in post-conviction cases shall be in accordance with the rules for criminal appeals. Where the notice of appeal is received by the clerk after the 30-day filing period has expired, the mailbox rule provides that the date of mailing is deemed to be the time of filing, provided that the notice of appeal was properly addressed and mailed to the circuit clerk.

Defendant, an inmate at Pontiac, placed the notice of appeal in the prison mail system several days before the 30-day filing period expired, but the notice did not reach the circuit clerk’s office until after that period had passed. The court concluded that the mailbox rule did not apply, however, because the mailing had been addressed to the State’s Attorney rather than to the circuit clerk. Although the State’s Attorney forwarded the notice of appeal to the circuit clerk, it was not received until after the filing period had expired.

The court added:

We are powerless to confer jurisdiction where none exists, regardless of our understanding of and sympathy for Maclin's position. We note that while this court is unable to consider Maclin's appeal, the rules allow him to seek recourse in the Illinois Supreme Court. The supreme court has the power to exercise its supervisory authority to reinstate appeals in this court that we are otherwise unable to consider.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Maiden, 2013 IL App (2d) 120016 (No. 2-12-0016, 6/18/13)

A notice of appeal received after its due date is deemed filed at the time of mailing. Proof of mailing “shall be as provided in Rule 12(b)(3)” Supreme Court Rule 373. Rule 12(b)(3) provides that mailing is proved “by certificate of the attorney, or an affidavit of a person other than the attorney, who deposited the paper in the mail *** stating the time and place of mailing ***, the complete address which appeared on the envelope ***, and the fact that proper postage was prepaid.”

Rule 12(b)(3) is liberally construed to accommodate incarcerated defendants because an incarcerated party cannot control the movement of a document after it is placed in the institutional mail. Administrative regulations of the Department of Corrections provide that prisoners are permitted to send reasonable amounts of legal mail, even with insufficient funds in their accounts to cover postage, if they provide signed vouchers authorizing deductions of future funds to cover the costs of postage. 20 Ill. Adm. Code 525.130(a).

Defendant executed a notarized affidavit stating that he timely placed a notice of appeal in the prison mail, properly addressed to the clerk and the State’s Attorney, but he did not state that proper postage was prepaid. His affidavit was sufficient to demonstrate that the notice of appeal had been mailed in a timely manner even though defendant did not attest that proper postage was prepaid. Defendant did all that he could do, which was to place the mail in the hands of the prison staff, and that was that he could attest to.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Maynard, 393 Ill.App.3d 605, 912 N.E.2d 1281 (4th Dist. 2009)

The State’s notice of appeal was premature where: (1) it was filed on the date the trial court issued its decision in a letter which instructed defense counsel to prepare a written order for the judge’s signature, and (2) a new notice of appeal was not filed after the trial court entered a written order six days later. Because the premature notice of appeal does not afford jurisdiction to consider an appeal from a suppression order, the State’s appeal was dismissed.

People v. Norton, 2015 IL App (2d) 130599 (No. 2-13-0599, 2/19/15)

The court found that it lacked jurisdiction to consider a successive post-conviction petition raising ineffective assistance of counsel where the trial court’s resolution of that motion delayed the notice of appeal more than 30 days after the first post-judgment motion was denied and past the point at which the Appellate Court could grant leave to file a late notice of appeal under Illinois Supreme Court Rule 606(c). The court acknowledged that the trial court erroneously advised defendant and counsel that a successive post-judgment motion raising ineffective assistance tolled the time for filing a notice of appeal, but found that it lacked authority to exercise jurisdiction over the appeal.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Peterson, 2011 IL App (3d) 100513 (Nos. 3-10-0513, 3-10-0514, 3-10-0515, 3-10-0546, 3-10-0550, 7/26/11)

When the State seeks review of an interlocutory order under Supreme Court Rule 604(d), it must either file a notice of appeal or a motion to reconsider the order within 30 days. An exception permits review beyond the 30-day time frame only where there is a material change in the facts that could not have been presented earlier with due diligence. This 30-day time limit is jurisdictional. **People v. Taylor**, 50 Ill.2d 136, 277 N.E.2d 878 (1971).

The State filed a motion *in limine* to admit certain hearsay statements pursuant to a statutory exception (725 ILCS 5/115-10.6) and under the common-law doctrine of forfeiture by wrongdoing. After a hearing, the circuit court ruled that some of the statements were inadmissible because they did not meet the statutory standard of reliability, but did not rule on the admissibility of the statements under the forfeiture doctrine. After more than 30 days had elapsed, the State filed a motion to reconsider asking the court to admit the excluded statements under the forfeiture doctrine. The defense objected to the motion as untimely. The court denied the motion, later clarifying that it believed that the statute codified and took precedence over the common law. The State filed a notice of appeal indicating its intent to appeal from both the original order and the denial of the motion to reconsider. After a defense motion to dismiss appeal was denied, the State sought and obtained leave to file a late notice of appeal from both rulings.

Based on its continuing duty to review its own jurisdiction over any matter pending before it, the Appellate Court declined to reach the merits of the State's appeal on the ground that the State had failed to properly perfect its appeal.

1. Because the State filed neither a notice of appeal nor a motion to reconsider within 30 days of the date of the original order, the court had jurisdiction to hear the appeal only if there had been a material change in the facts that could not have been presented earlier with due diligence. The Illinois Supreme Court's decision in **People v. Hanson**, 238 Ill.2d 74, 939 N.E.2d 238 (2010), decided a week before the motion to reconsider was filed, was not a material change in the facts allowing for an exception to the 30-day limit.

Even assuming that a change in the law could trigger the change-in-the-facts exception, **Hanson** did not change the law by recognizing that the doctrine of forfeiture by wrongdoing was a hearsay exception as well as a confrontation-clause exception. Nor did **Hanson** adopt a new rule that admissibility under the forfeiture doctrine does not depend on a showing of reliability. The forfeiture doctrine was adopted by the Illinois Supreme Court three years earlier in **People v. Stechly**, 225 Ill.2d 246, 870 N.E.2d 333 (2007). In **Stechly**, the court held that the doctrine was co-extensive with Federal Rule of Evidence 804(b)(6), which is both a hearsay and a confrontation-clause exception, and does not condition the admissibility of the statements on a showing of reliability. Moreover, the common-law doctrine is an equitable rule that has never required a showing of reliability. That the State initially sought admission of both testimonial and hearsay statements under the forfeiture doctrine belies its claim that it was unaware prior to **Hanson** that the doctrine applied to hearsay as well as testimonial evidence.

2. Even if **Hanson** did clarify the common-law rule in some material respects, there was no excuse for the State's failure to file a timely notice of appeal or motion to reconsider. The State's motion was based on statutory and common-law grounds, and the court failed to rule on the common-law grounds. Some of the hearsay statements that the State sought to admit were testimonial. At a minimum, the State could have timely appealed the motion with respect to those statements under **Stechly**.

3. The ruling on the motion to reconsider was not separate and independent from the

original order. The motion to reconsider raised no new issue not raised by the original motion. Both the court and the State treated the motion as a motion to reconsider. It makes no difference that the circuit court did not consider the forfeiture doctrine in its original order. The **Taylor** rule applies to appealable suppression orders, not merely to the legal grounds upon which suppression orders are decided. Like the doctrine of *res judicata*, the **Taylor** rule is not limited to issues actually considered, but those that could have been raised in the earlier proceeding. The original ruling was immediately appealable regardless of whether it reached each or any theory of admissibility argued by the State. The underlying merit of the State's appeal is irrelevant to whether the State properly perfected the appeal.

4. Supreme Court Rule 606(c) provides that the Appellate Court may grant leave to file a late notice of appeal where the appellant files a motion in the reviewing court within 30 days of the expiration of the time for filing the notice of appeal supported by a showing of reasonable excuse for failing to file the notice of appeal on time. This rule is applicable to interlocutory appeals by the State. The rule does not excuse the State's failure to file a timely notice of appeal because the State provided no reasonable excuse for its untimely appeal other than its claim that **Hanson** changed the law, which is unsupportable.

5. Carter, J., dissented, concluding that the court had jurisdiction and that the excluded statements were admissible under the forfeiture doctrine.

The State could not appeal from a ruling on the admissibility of the statements pursuant to the common-law forfeiture doctrine until it obtained a ruling on that ground. As the circuit court did not consider that ground in its original order, the State's motion asking for a ruling on that ground was not a motion to reconsider the original order. Thus, the second ruling was an independent ruling from the original order from which a timely appeal was taken.

Moreover, **Hanson** held for the first time that the forfeiture doctrine is an exception to both the hearsay rule and the confrontation clause, and that the statements need not reflect any additional indicia of reliability to be admitted. Just as an exception to the law-of-the-case doctrine exists where the Supreme Court, following an appeal, makes a contrary ruling on the precise issue of law on which the Appellate Court had based its prior opinion, the State should have been allowed to reopen the issue of the admissibility of the statements post-**Hanson** to allow the circuit court to correct itself.

People v. Salcedo, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-3148, 6/9/11)

1. Unless a timely post-judgment motion is filed, the trial court loses jurisdiction 30 days after final judgment is entered. In a criminal case, the sentence is the final judgment. Thus, the trial court retains jurisdiction only if the defendant files a motion to reconsider the sentence or a notice of appeal within 30 days of sentencing.

2. Without deciding whether the trial court has authority to grant an extension of time in which to file a post-sentencing motion, the court found that the motion which the judge granted was merely a continuance of the hearing on such a motion, if one was timely filed. The court noted that defense counsel's motion stated that because he was involved in another trial, he would be unavailable for "any evidentiary trial or hearing."

3. The court concluded, however, that the parties revested the trial court with jurisdiction to consider an untimely post-sentencing motion. Under the revestment doctrine, parties revest the trial court with personal and subject matter jurisdiction by actively participating in proceedings which are inconsistent with the merits of a prior judgment. Conduct is deemed inconsistent with a prior judgment where it could be construed as an indication that the parties do not view the prior judgment as final and binding. Active

participation, rather than mere consent, is required to revest jurisdiction.

If jurisdiction is revested in the trial court, the filing of a notice of appeal within 30 days after the ruling on an untimely post-judgment motion vests the Appellate Court with jurisdiction.

Here, the State revested the trial court with jurisdiction when it affirmatively argued that defendant's untimely motion to reconsider the sentence should be denied on its merits. "By participating rather than objecting to the hearing, the State essentially acknowledged that the previous sentencing judgment should be revisited." The court rejected the argument that jurisdiction is revested only where both parties specifically seek to set aside the judgment; the revestment doctrine applies where a party challenges a prior judgment and the opposing party acts in a manner that is inconsistent with the final and binding nature of that judgment.

Defendant's convictions for first degree murder and aggravated battery with a firearm were affirmed.

(Defendant was represented by Assistant Defender Michael Soukup, Chicago.)

People v. Smith, 2011 IL App (4th) 100430 (No. 4-10-0430, 10/11/11)

A court will consider an incarcerated defendant's postplea motion to be timely filed if the defendant placed it in the prison mail system within the requisite 30-day period for filing of a postplea motion, regardless of the date on which it was received or file-stamped.

Defendant was sentenced on July 31, 2009, and his postplea motion was due on Monday, August 31, 2009. It was file-stamped on September 2, 2009. An affidavit of service and proof of service showing timely mailing from the prison accompanied the postplea motion. The affidavit was not notarized.

Applying **People v. Tlatenchi**, 391 Ill.App.3d 705, 909 N.E.2d 198 (2009), the Appellate Court concluded that when a defendant relies on the date of mailing as the date of filing for a postplea motion, proof of mailing must be as provided by Supreme Court Rule 12(b)(3). That rule requires that service by a non-attorney be proved by an affidavit attesting to the time and place of mailing, the complete address appearing on the envelope, and the fact that proper postage was prepaid. The affidavit must be sworn to before an authorized person to be considered an affidavit. Verification pursuant to 735 ILCS 5/1-109 is not a substitute for the affidavit required by Rule 12(b)(3).

The court declined to follow **People v. Hansen**, 2011 IL App (2d) 081226, which concluded that it was unreasonable to refuse to allow proof of mailing by an inmate into the prison mail system other than by Rule 12(b)(3).

Because defendant's proof of mailing was not notarized, it was insufficient to establish timely mailing. The trial court was divested of subject-matter jurisdiction to consider the untimely postplea motion after 30 days, and therefore the trial court's order disposing of the postplea motion was void. The appeal was dismissed because a "void order does not cloak the appellate court with jurisdiction to consider the merits of an appeal."

Cook, J., dissented. Unlike **Tlatenchi**, the State did not raise the issue of the sufficiency of the proof of mailing in the circuit court and in fact agreed that the motion was timely. Rule 12(a)(3) does not impose a jurisdictional requirement as to the notarization of affidavits of service. Therefore the State is bound by its waiver and the court should address the case on its merits.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Spencer, 408 Ill.App.3d 1, 948 N.E.2d 196 (1st Dist. 2011)

A defendant must file his notice of appeal within 30 days of the entry of the final

judgment from which he is appealing, or, if a motion directed against the judgment is timely filed, within 30 days of the order disposing of that motion.

Defendant's notice of appeal was timely filed. Defendant was sentenced on January 25, 2008. On February 19, 2008, defendant filed a motion to reconsider sentence, as demonstrated by a faint file stamp on the notice of that motion and by a proof of service signed and certified by a non-attorney that the motion was presented to the clerk and the State's Attorney on that date. A notice of appeal was then filed on April 10, 2008, the date that the defendant withdrew the motion.

(Defendant was represented by Assistant Defender John Koltse, Chicago.)

People v. Stanford, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0420, 6/16/11)

A notice of appeal must be filed within 30 days of the date of the final judgment, which is either the date of sentencing or the date of the disposition of a timely-filed post-judgment motion.

Although ordinarily defendant has no authority to file a *pro se* motion while he is represented by counsel, the Appellate Court concluded that the timely filing of a *pro se* motion to reduce sentence tolled the time for the filing of the notice of appeal, considering the "unusual circumstances of this case." First, defendant evinced his intent to appeal by filing the *pro se* motion and a notice of appeal. Second, it was not unreasonable for defendant to act *pro se* following the sentencing hearing, because his counsel was preoccupied with his own surgery and recovery. Third, statements made by the court to the defendant at a status hearing, to the effect that his notice of appeal was premature and that he could not appeal until his motion to reconsider sentence had been heard, led the defendant to withdraw his notice of appeal and to believe that his *pro se* motion tolled the time for filing the notice of appeal.

Therefore, a notice of appeal, filed on the same day that the court denied the *pro se* motion and counsel's untimely-filed motion to reconsider sentence, was timely and the Appellate Court had jurisdiction to hear the appeal.

(Defendant was represented by Assistant Defender Kathleen Weck, Elgin.)

People v. Stevenson, 2011 IL App (1st) 093413 (No. 1-09-3413, 11/4/11)

Supreme Court Rule 606(b) provides that "[w]hen a timely posttrial or postsentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court," and a "new notice of appeal must be filed within 30 days following the entry of the order disposing of all timely filed postjudgment motions."

Defendant mailed a *pro se* motion to reconsider sentence from prison on the same date that the court denied trial counsel's timely-filed motion to reconsider sentence and that trial counsel filed a notice of appeal. The *pro se* motion raised the same issue raised in trial counsel's motion. The circuit court denied the *pro se* motion 18 months later, after defendant's appellate counsel had the motion placed on the circuit court's call for a ruling. The Appellate Court concluded for the following reasons that the *pro se* motion did not void the notice of appeal previously filed by counsel pursuant to Rule 606(b), and therefore it did not have jurisdiction to hear an appeal from the denial of that motion.

1. Defendant had no right to file a *pro se* post-sentencing motion. With the exception of post-trial motions alleging ineffective assistance of trial counsel, defendants represented by counsel have no authority to file *pro se* motions and the court should not consider such motions. The Appellate Court concluded that the record refuted that the trial court exercised

its discretion to permit hybrid representation during the post-trial proceedings. Defendant never made a clear statement to the court that he wanted to proceed *pro se*, and the trial court informed defendant numerous times following the denial of his post-trial motion alleging trial counsel's ineffectiveness that he was represented by counsel and could not file any further *pro se* post-trial motions. The Appellate Court also rejected the argument that defendant was not represented by counsel at the time he filed his *pro se* motion as there was no indication in the record that trial counsel had asked for leave to withdraw.

2. Even assuming that defendant did have the right to file a *pro se* motion, the plain language of Rule 606(b) contemplates the filing of only one post-judgment motion directed against the conviction or the sentence or both. It does not authorize the filing of successive and repetitious motions that raise issues that were or could have been raised earlier and thereby extend the time for appeal.

3. Even if the trial court could be required to rule on a successive motion, defendant's *pro se* motion was not properly filed because no notice accompanied the motion that would have brought the motion to the attention of the trial court within a reasonable time. At the time that defendant filed his motion, 730 ILCS 5/5-8-1(c) provided that a post-sentencing motion would not be deemed timely filed "unless it is filed with the circuit court clerk within 30 days after the sentence is imposed together with a notice of motion, which notice shall set the motion on the court's calendar on a date certain within a reasonable time after the date of filing." The tolling provisions of Rule 606(b) were not triggered by the filing of the *pro se* motion due to defendant's failure to comply with this notice requirement.

4. Litigants may revest a court that has general jurisdiction over the matter with personal and subject matter jurisdiction after it has been lost if they actively participate without objection in further proceedings that are inconsistent with the merits of the prior judgment. The revestment doctrine did not apply in this case because the parties cannot divest the Appellate Court of jurisdiction it obtained with the filing of a notice of appeal and a certificate in lieu of record. Moreover, although the State did not object to the circuit court's jurisdiction to rule on the *pro se* motion, neither was its conduct inconsistent with the merits of the final judgment as the State defended the validity of the sentencing proceedings.

Although the notice of appeal filed by trial counsel following denial of his motion to reconsider did properly perfect an appeal from defendant's conviction, that appeal was dismissed on appellate counsel's motion, and the Appellate Court had lost jurisdiction to reinstate that appeal due to the passage of time.

(Defendant was represented by Assistant Defender Lindsey Anderson, Chicago.)

People v. Terefenko, 2014 IL App (3d) 120850 (No. 3-12-0850, 9/12/14)

1. Appeals from post-conviction proceedings are generally governed by the rules for criminal appeals. Under Illinois Supreme Court Rule 604(b) a defendant must file a notice of appeal in the circuit court within 30 days after the entry of a final judgment or, if defendant files a timely motion attacking the final judgment, within 30 days of a dispositive ruling on that motion. If defendant files no motion against the judgment within 30 days, the trial court loses jurisdiction. A timely notice of appeal is necessary to vest the Appellate Court with jurisdiction.

2. The trial court held a third-stage evidentiary hearing on defendant's post-conviction petition. Defendant, who had been deported, was not present during the hearing, but his counsel agreed to hold the hearing in his absence. After dismissing the petition on August 20, the court asked counsel if he wanted to appeal. Counsel reserved his decision, and the court scheduled a status hearing for September 19, and when counsel did not appear, continued the

case until September 20.

When counsel did not appear again on September 20, the court extended the deadline for filing post-judgment motions to October 4. On that date counsel informed the court that he would not be filing any post-judgment motions or a notice of appeal. After determining that the clerk had notified defendant at his last known address of his right to appeal, the court appointed OSAD to file a notice of appeal for defendant, which it did on October 5.

3. The Appellate Court held that it lacked jurisdiction to consider defendant's appeal since he did not file a timely notice of appeal within 30 days of the final judgment date. The final judgment was entered on August 20, making September 19 the deadline for filing a notice of appeal or a post-judgment motion. The October 5th filing came too late.

The Appellate Court rejected defendant's argument that the notice of appeal was timely because the trial court had extended the deadline for filing post-judgment motions until October 4, the date it ordered OSAD to file a notice of appeal. Defendant relied on **People v. Church**, 334 Ill. App. 3d 607 (3d. Dist., 2002) for the proposition that upon a proper application and showing of good cause, a trial court has the inherent authority to grant an extension of time for filing a post-judgment motion.

Here, however, defendant never made a proper application or established good cause for an extension of time. Additionally, the trial court never explicitly authorized an extension of time for filing a notice of appeal on September 19. Instead, the court merely stated that it didn't know if defense counsel was going to file a notice of appeal and then continued the case until September 20 "for that purpose." The Appellate Court held that such language was not explicit enough to grant an extension.

4. The court also rejected defendant's argument that jurisdiction was proper because the trial court failed to properly notify defendant of his right to appeal. Under Supreme Court Rule 651(b), upon entry of an adverse judgment in a post-conviction case, the clerk of the trial court shall at once mail or deliver to defendant notice that the court has ruled against him and that he has the right to appeal.

The clerk "at once" mailed notice of the court's ruling to defendant at his last known address. Although the trial court knew defendant had been deported to Poland and the last known address was in the United States, defendant had a responsibility to inform the court of a new address in Poland; the trial court had no obligation to locate the new address itself.

Illinois Supreme Court Rule 606(c) allows a defendant to file a late notice of appeal where the failure to file a timely notice was not due to defendant's culpable negligence. Defendant had no reasonable excuse for failing to keep the court informed of his whereabouts, and his lack of communication with the court was culpable negligence.

5. The dissent would hold that under **Church** the trial court properly extended the time until October 5 for defendant to file a notice of appeal. Although there was no formal application for and showing of good cause, the trial court was concerned about defendant's absence and whether he received notice of the court's judgment. Under these circumstances, defendant's notice of appeal was timely.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

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§2-3
Counsel

People v. Merriweather, 2013 IL App (1st) 113789 (1-11-3789, 10/15/13)

1. Defendant argued that because the 30-day period following a guilty plea is a “critical stage” of the criminal process during which the defendant has a constitutional right to counsel, the trial court must appoint counsel when a defendant who pleaded guilty files any *pro se* document requesting the appointment of counsel. Defendant entered a negotiated guilty plea, and subsequently filed a *pro se* notice of appeal without filing a motion to withdraw the plea. Supreme Court Rule 604(d) requires that a defendant who wishes to appeal from a negotiated guilty plea must first file a motion to withdraw the plea. Under Rule 604(d), if the defendant is indigent counsel is to be appointed upon the filing of the motion to withdraw the plea.

The court rejected the argument, noting that defendant was represented by counsel at both his guilty plea and sentencing and properly admonished by the trial court concerning the requirement that he move to withdraw his plea. The court stated that under Rule 604(d), filing a motion to withdraw a negotiated plea is a “condition precedent” to taking an appeal and triggers the right to counsel on appeal.

2. The court also rejected the argument that constitutional questions would be raised concerning Supreme Court Rule 606(a), which governs the perfection of appeals, unless counsel is appointed whenever a *pro se* guilty plea defendant files a notice of appeal. Defendant argued that Rule 606(a) permits a defendant to file a *pro se* notice of appeal without filing a motion to withdraw the plea, and that a defendant might unintentionally waive his right to an appeal because he does not have the assistance of counsel in filing a motion to withdraw the plea and perfecting the appeal.

The court acknowledged that Rule 606(a) permits a defendant to file a *pro se* notice of appeal. However, without fully explaining its holding, the court found that a guilty plea defendant who defaults on the Rule 604(d) requirement to file a motion to withdraw the plea is not constitutionally entitled to the appointment of counsel for appeal. The court also noted that although defendant’s direct appeal must be dismissed due to the failure to comply with Rule 604(d), defendant is not barred from raising constitutional claims in post-conviction proceedings.

(Defendant was represented by Assistant Defender Ginger Leigh Odom, Chicago.)

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§2-4

State Appeals

§2-4(a)

Generally

In re K.E.F., 235 Ill.2d 530, ___ N.E.2d ___ (2009) (No. 107402, 12/17/09)

1. Supreme Court Rule 604(a)(1) provides that in criminal cases, the State may appeal from an order which has the effect of “suppressing evidence,” if the State certifies that the suppression substantially impairs the State’s ability to prosecute the case. Under **People v. Drum**, 194 Ill.2d 485, 743 N.E.2d 44 (2000), evidence is “suppressed” within the meaning of Rule 604(a)(1) if the order prevents information from being presented to the trier of fact. Where the trial court’s ruling leaves open another method for admission of the evidence in question, but the State declines to avail itself of that option, evidence has not been “suppressed.”

2. Where the trial court held that statements by an alleged victim of child sexual abuse were reliable and could be admitted under 725 ILCS 5/115-10 if the other provisions of §115-10 were satisfied, a DVD of the statement was not “suppressed” when the court deemed that the complainant had failed to “testify” as required by §115-10. When the State called the minor as a witness, it made no attempt to question her about the events underlying the charges or the content of her statement. Instead, the prosecution limited its direct examination to the circumstances surrounding the videotaped statement, asking whether the minor had spoken to the investigator who took the statement and whether her answers had been truthful.

The court concluded that the DVD was not “suppressed” because the State could have gained admission of the evidence by merely asking the complainant questions concerning the alleged offense, so that she would have “testified” in accordance with §115-10:

[T]he State chose – for reasons that quite frankly defy comprehension – to attempt to gain admission of a prior statement that the trial court had already ruled reliable and admissible . . . by calling the alleged victim to the stand and asking her only whether she had previously answered [the investigator’s] questions truthfully. . . . The trial court indicated it would admit the statement under various scenarios, so long as the prosecutor questioned [the minor] about the pertinent events, irrespective of her answers, but the prosecutor was steadfast in his refusal and his desire to pursue an interlocutory appeal.

We question the wisdom of that course of action, but we have no doubt that . . . admissibility of the evidence in question was a matter entirely within the State’s control. . . . [T]he sole impact of the circuit court’s order is on the *means* by which the information is to be presented. That is not suppression of evidence.

3. In dissent, Justices Burke and Freeman found that the majority should have first determined the issue on which leave to appeal had been granted – whether Rule 604(a)(1) applies in juvenile delinquency proceedings, instead of focusing on the secondary question of whether the order “suppressed” evidence.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Holmes, 235 Ill.2d 59, 919 N.E.2d 318 (2009)

1. Under **People v. Taylor**, 50 Ill.2d 136, 277 N.E.2d 878 (1971), the State is barred from relitigating pretrial issues where a defense motion to suppress was granted and the State failed to file a timely appeal or motion to reconsider. For purposes of the **Taylor** rule, there is no substantive difference between evidence suppressed based on the State’s wrongful conduct and evidence that is excluded on evidentiary grounds. In either case, further litigation requires a timely notice of appeal or motion to reconsider.

An exception to the **Taylor** rule allows review where there has been a material change in the evidence which, with due diligence, could not have been presented at the previous proceeding.

2. Where the State failed to file a notice of appeal or motion to reconsider from an order excluding evidence of defendant’s prior convictions, a motion to reconsider filed almost two years later was untimely. The exception to the **Taylor** rule - for material changes in the evidence - was inapplicable for two reasons. First, the purported change in the evidence concerned a matter of which the State had been aware throughout the proceedings.

Second, the State failed to demonstrate due diligence where it had known of the allegation for almost two years, but simply failed to investigate.

People v. Martinez, 2013 IL 113475 (No. 113475, 4/18/13)

1. The Illinois Constitution provides that there shall be no appeal from a judgment of acquittal after a trial on the merits in a criminal case. Ill. Const. 1970, Art. V, §6. The prohibition against the State appealing an acquittal is grounded in the principle of double jeopardy. The State may appeal in criminal cases only from a judgment or order that has the substantive effect of dismissing a charge. Supreme Court Rule 604(a)(1).

2. To trigger the protections of the double jeopardy clause, there must first be an attachment of jeopardy. Generally, in a jury trial, jeopardy attaches when a jury is empaneled and sworn. But in assessing whether jeopardy has attached, rules should not be applied mechanically when the interests they protect are not endangered and when their mechanical application would frustrate society's interest in enforcing its criminal laws. The overriding inquiry should be whether the defendant was actually in danger or at risk of being found guilty of any offense.

3. The State participated in jury selection after the court denied the State's oral motion for a continuance of the trial because two of its witnesses were not present. Before the jury was sworn, the State presented a written motion for a continuance. When the court denied that motion, the State indicated it would not participate any further in the proceedings. The jury was sworn, the State declined to present any evidence, and the court granted the defense motion for a directed acquittal. The State appealed.

Under the "unique set of facts presented here," jeopardy did not attach when the jury was sworn. Defendant was never at risk of a conviction when the State indicated it would not participate before the jury was sworn. The defendant's interest in retaining a chosen jury was not implicated where there was no trial to be completed by that tribunal. Because defendant was not placed in jeopardy, there was no true acquittal.

The Illinois Supreme Court therefore concluded that the State could appeal from the circuit court's judgment. Rather than an acquittal, the order of the trial court directing judgment in favor of the defendant was an appealable dismissal order under Rule 604(a)(1).

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

In re B.C.P., 2012 IL App (3d) 100921 (No. 3-10-0921, 1/23/12)

In general, the Appellate Court only has jurisdiction to review an appeal from a final judgment, and does not have jurisdiction to review an interlocutory appeal unless jurisdiction is specifically provided by Supreme Court Rule.

Two Supreme Court Rules provide for appeals in juvenile delinquency proceedings: Rule 660(a) and Rule 662. Rule 660(a) provides that "[a]ppeals from final judgments . . . shall be governed by the rules applicable to criminal cases," except where otherwise specifically provided. Rule 662 provides for interlocutory appeals, but only under very limited circumstances—when a dispositional order has not been entered within 90 days from either an adjudication of wardship or a revocation of probation or conditional discharge.

The State sought to appeal from an order granting a motion to suppress the statement of a minor in a juvenile delinquency proceeding. Neither Rule 660(a) nor Rule 662 authorize an interlocutory appeal from such an order.

The court refused to read Rule 660(a) to incorporate Rule 604(a)(1), which authorizes the State to appeal from a suppression order in a criminal case. While Rule 660(a) incorporates the rules applicable to criminal cases, it does so only in the context of appeals from final

judgments. A suppression order is not a final judgment. Where the language of the rule was clear and unambiguous, the court could not read into Rule 660 exceptions, limitations, and conditions that the drafters did not intend. If the drafters of the rules had intended to allow an interlocutory appeal from a suppression order in a juvenile proceeding, they would have so provided in Rule 662.

The court dismissed the State's appeal for lack of jurisdiction.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Latimer, 403 Ill.App.3d 595, 935 N.E.2d 1037 (2d Dist. 2010)

On appeal, the State expressed concern that the court's suppression order might lead to confusion at trial if it offered evidence that the court had not suppressed. The Appellate Court refused to address the State's concerns. Supreme Court Rule 604(a)(1) authorizes the State to appeal from an order the substantive effect of which results in the suppression of evidence. The State is not authorized to appeal from an order that might result in confusion. The State was in effect seeking an impermissible advisory opinion.

(Defendant was represented by Assistant Defender Linda Johnson, Elgin.)

People v. Martinez, 2011 IL App (2d) 100498 (No. 2-10-0498, 10/5/11)

The Illinois Constitution provides that "after a trial on the merits in a criminal case, there shall be no appeal from a judgment of acquittal." Ill. Const. 1970, Art. VI, §6. Where there has been a purported acquittal in a criminal proceeding, the question of whether the acquittal followed a trial on the merits as understood by the Illinois Constitution is answered by whether jeopardy attached before the acquittal was rendered. Whether jeopardy attached is decided based on whether defendant was placed at risk of a determination of guilt, not by mechanical application of a rule of thumb, such as whether the jury was empaneled and sworn.

The "acquittal" entered by the trial court was in fact a dismissal from which the State could appeal. Supreme Court Rule 604(a)(1). A jury was sworn and given preliminary instructions but before the jury was sworn, the State unsuccessfully moved for a continuance, and indicated that it would not participate in the trial as its material witnesses were absent. The court ultimately granted the defense motion for a directed finding after no evidence was presented. As there was no risk of a determination of guilt, jeopardy had not attached.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

People v. Mendiola, 2014 IL App (4th) 130542 (No. 4-13-0542, 3/4/14)

1. In criminal cases, the State may appeal from an order or judgment which has the substantive effect of dismissing a charge, arresting judgment, quashing an arrest or search warrant, or suppressing or excluding evidence. (Sup. Ct. Rule 604(a)(1)). Generally, the notice of appeal is due within 30 days after entry of judgement. (Sup. Ct. Rule 606(b)).

2. Before defendant's trial on four counts of aggravated criminal sexual abuse and one count of predatory criminal sexual assault of a child, the State filed a motion *in limine* to admit the recording of a telephone call between defendant and the mother of the complainants. After the motion was denied, the cause proceeded to a jury trial. The trial resulted in acquittals on the four counts of aggravated criminal sexual abuse and a hung jury on the single count of predatory criminal sexual assault of a child. A mistrial was declared on that count.

Before the retrial on the remaining count, the State again filed the motion *in limine* seeking to introduce the recording. The trial court again denied the motion, and the State filed

a notice of appeal.

The Appellate Court concluded that it lacked jurisdiction to consider the appeal because the State did not appeal before the first trial. The court found that under **People v. Nelson**, 377 Ill.App.3d 1031, 880 N.E.2d 1096 (1st Dist. 2007), the State waived its right to appeal the trial court's denial of the motion when it elected to proceed with the first trial rather than appeal the pretrial ruling. "The State forfeited its right to appeal based on the supposed substantial impairment of its case when it decided to prosecute defendant."

3. The court rejected the argument that the trial court's ruling occurred after the first trial had started, at which time the State could have appealed only rulings on motions to suppress illegally seized evidence. (725 ILCS 5/114-12(c)). Because the trial court denied the motion *in limine* after *voir dire* had started but before any jurors had been sworn, jeopardy had not attached. Thus, the denial constituted a pretrial ruling.

The appeal was dismissed for lack of jurisdiction.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Newlin, 2014 IL App (5th) 120518 (No. 5-12-0518, 9/23/14)

On defendant's direct appeal challenging the sentence for his first degree murder conviction, the Appellate Court concluded that it lacked jurisdiction to consider the State's attempt to raise the trial court's failure to impose mandatory fines. First, the court noted that the record failed to support the argument that mandatory fines had not been imposed, rejecting the State's attempt to use a printout of the circuit clerk's online records to show what assessments were allegedly made. Second, the court stated that the failure to impose mandatory fines is not a matter which can be appealed by the State under Supreme Court Rule 604(a).

The court concluded:

What the State is essentially trying to do . . . is to piggyback an appeal on defendant's appeal. We can find no authority for such practice and will not allow the State to raise the issue of fines in such a manner.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

People v. Peterson, 2011 IL App (3d) 100513 (Nos. 3-10-0513, 3-10-0514, 3-10-0515, 3-10-0546, 3-10-0550, 7/26/11)

When the State seeks review of an interlocutory order under Supreme Court Rule 604(d), it must either file a notice of appeal or a motion to reconsider the order within 30 days. An exception permits review beyond the 30-day time frame only where there is a material change in the facts that could not have been presented earlier with due diligence. This 30-day time limit is jurisdictional. **People v. Taylor**, 50 Ill.2d 136, 277 N.E.2d 878 (1971).

The State filed a motion *in limine* to admit certain hearsay statements pursuant to a statutory exception (725 ILCS 5/115-10.6) and under the common-law doctrine of forfeiture by wrongdoing. After a hearing, the circuit court ruled that some of the statements were inadmissible because they did not meet the statutory standard of reliability, but did not rule on the admissibility of the statements under the forfeiture doctrine. After more than 30 days had elapsed, the State filed a motion to reconsider asking the court to admit the excluded statements under the forfeiture doctrine. The defense objected to the motion as untimely. The court denied the motion, later clarifying that it believed that the statute codified and took precedence over the common law. The State filed a notice of appeal indicating its intent to appeal from both the original order and the denial of the motion to reconsider. After a defense

motion to dismiss appeal was denied, the State sought and obtained leave to file a late notice of appeal from both rulings.

Based on its continuing duty to review its own jurisdiction over any matter pending before it, the Appellate Court declined to reach the merits of the State's appeal on the ground that the State had failed to properly perfect its appeal.

1. Because the State filed neither a notice of appeal nor a motion to reconsider within 30 days of the date of the original order, the court had jurisdiction to hear the appeal only if there had been a material change in the facts that could not have been presented earlier with due diligence. The Illinois Supreme Court's decision in **People v. Hanson**, 238 Ill.2d 74, 939 N.E.2d 238 (2010), decided a week before the motion to reconsider was filed, was not a material change in the facts allowing for an exception to the 30-day limit.

Even assuming that a change in the law could trigger the change-in-the-facts exception, **Hanson** did not change the law by recognizing that the doctrine of forfeiture by wrongdoing was a hearsay exception as well as a confrontation-clause exception. Nor did **Hanson** adopt a new rule that admissibility under the forfeiture doctrine does not depend on a showing of reliability. The forfeiture doctrine was adopted by the Illinois Supreme Court three years earlier in **People v. Stechly**, 225 Ill.2d 246, 870 N.E.2d 333 (2007). In **Stechly**, the court held that the doctrine was co-extensive with Federal Rule of Evidence 804(b)(6), which is both a hearsay and a confrontation-clause exception, and does not condition the admissibility of the statements on a showing of reliability. Moreover, the common-law doctrine is an equitable rule that has never required a showing of reliability. That the State initially sought admission of both testimonial and hearsay statements under the forfeiture doctrine belies its claim that it was unaware prior to **Hanson** that the doctrine applied to hearsay as well as testimonial evidence.

2. Even if **Hanson** did clarify the common-law rule in some material respects, there was no excuse for the State's failure to file a timely notice of appeal or motion to reconsider. The State's motion was based on statutory and common-law grounds, and the court failed to rule on the common-law grounds. Some of the hearsay statements that the State sought to admit were testimonial. At a minimum, the State could have timely appealed the motion with respect to those statements under **Stechly**.

3. The ruling on the motion to reconsider was not separate and independent from the original order. The motion to reconsider raised no new issue not raised by the original motion. Both the court and the State treated the motion as a motion to reconsider. It makes no difference that the circuit court did not consider the forfeiture doctrine in its original order. The **Taylor** rule applies to appealable suppression orders, not merely to the legal grounds upon which suppression orders are decided. Like the doctrine of *res judicata*, the **Taylor** rule is not limited to issues actually considered, but those that could have been raised in the earlier proceeding. The original ruling was immediately appealable regardless of whether it reached each or any theory of admissibility argued by the State. The underlying merit of the State's appeal is irrelevant to whether the State properly perfected the appeal.

4. Supreme Court Rule 606(c) provides that the Appellate Court may grant leave to file a late notice of appeal where the appellant files a motion in the reviewing court within 30 days of the expiration of the time for filing the notice of appeal supported by a showing of reasonable excuse for failing to file the notice of appeal on time. This rule is applicable to interlocutory appeals by the State. The rule does not excuse the State's failure to file a timely notice of appeal because the State provided no reasonable excuse for its untimely appeal other than its claim that **Hanson** changed the law, which is unsupportable.

5. Carter, J., dissented, concluding that the court had jurisdiction and that the excluded

statements were admissible under the forfeiture doctrine.

The State could not appeal from a ruling on the admissibility of the statements pursuant to the common-law forfeiture doctrine until it obtained a ruling on that ground. As the circuit court did not consider that ground in its original order, the State's motion asking for a ruling on that ground was not a motion to reconsider the original order. Thus, the second ruling was an independent ruling from the original order from which a timely appeal was taken.

Moreover, **Hanson** held for the first time that the forfeiture doctrine is an exception to both the hearsay rule and the confrontation clause, and that the statements need not reflect any additional indicia of reliability to be admitted. Just as an exception to the law-of-the-case doctrine exists where the Supreme Court, following an appeal, makes a contrary ruling on the precise issue of law on which the Appellate Court had based its prior opinion, the State should have been allowed to reopen the issue of the admissibility of the statements post-**Hanson** to allow the circuit court to correct itself.

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§2-4(b)

Suppression Orders

In re B.C.P., 2013 IL 113908 (No. 113908, 6/20/13)

Supreme Court Rule 660(a), governing appeals in delinquent minor cases, incorporates the criminal appeals rules, but only as to final judgments. Supreme Court Rule 662 allows for certain interlocutory appeals in juvenile cases, but an order granting a motion to suppress is not one of them. Therefore, the provision of Supreme Court Rule 604(a)(1) allowing the State to appeal from an order granting a motion to suppress does not apply to juvenile cases under existing appellate rules.

Exercising its rulemaking authority, the Illinois Supreme Court held that Rule 660(a) should be modified to allow the State to appeal from an interlocutory order suppressing evidence in a juvenile delinquency proceeding. Since the adoption of Rule 660(a), the General Assembly has radically altered the Juvenile Court Act to make the juvenile adjudicatory process more criminal in nature. As a consequence, juveniles receive many of the same protections that criminal defendants receive. In light of this shift, the State has the same interests in appealing a suppression order in a juvenile case that it does in a criminal case: obtaining correction of errors that would otherwise be precluded by the double jeopardy clause; avoiding unfairness in allowing errors favoring the State to be corrected while not allowing correction of errors favoring the defense, resulting in distortion of the development of the law; and eliminating frustration of the primary purpose of a trial – to ascertain the truth of the charges.

Given the compelling case for the need for interlocutory review of suppression orders in juvenile cases, the supreme court saw no need to defer the matter to the rules committee. Extending the expedited appeal process provided by Supreme Court Rule 660A to State appeals from suppression orders adequately addressed any concern that delays caused by appeals could interfere with the rehabilitation of the minors.

(Respondent was represented by Assistant Defender Gabrielle Green, Ottawa.)

In re K.E.F., 235 Ill.2d 530, ___ N.E.2d ___ (2009) (No. 107402, 12/17/09)

1. Supreme Court Rule 604(a)(1) provides that in criminal cases, the State may appeal from an order which has the effect of “suppressing evidence,” if the State certifies that the suppression substantially impairs the State’s ability to prosecute the case. Under **People v. Drum**, 194 Ill.2d 485, 743 N.E.2d 44 (2000), evidence is “suppressed” within the meaning of Rule 604(a)(1) if the order prevents information from being presented to the trier of fact. Where the trial court’s ruling leaves open another method for admission of the evidence in question, but the State declines to avail itself of that option, evidence has not been “suppressed.”

2. Where the trial court held that statements by an alleged victim of child sexual abuse were reliable and could be admitted under 725 ILCS 5/115-10 if the other provisions of §115-10 were satisfied, a DVD of the statement was not “suppressed” when the court deemed that the complainant had failed to “testify” as required by §115-10. When the State called the minor as a witness, it made no attempt to question her about the events underlying the charges or the content of her statement. Instead, the prosecution limited its direct examination to the circumstances surrounding the videotaped statement, asking whether the minor had spoken to the investigator who took the statement and whether her answers had been truthful.

The court concluded that the DVD was not “suppressed” because the State could have gained admission of the evidence by merely asking the complainant questions concerning the alleged offense, so that she would have “testified” in accordance with §115-10:

[T]he State chose – for reasons that quite frankly defy comprehension – to attempt to gain admission of a prior statement that the trial court had already ruled reliable and admissible . . . by calling the alleged victim to the stand and asking her only whether she had previously answered [the investigator’s] questions truthfully. . . . The trial court indicated it would admit the statement under various scenarios, so long as the prosecutor questioned [the minor] about the pertinent events, irrespective of her answers, but the prosecutor was steadfast in his refusal and his desire to pursue an interlocutory appeal.

We question the wisdom of that course of action, but we have no doubt that . . . admissibility of the evidence in question was a matter entirely within the State’s control. . . . [T]he sole impact of the circuit court’s order is on the *means* by which the information is to be presented. That is not suppression of evidence.

3. In dissent, Justices Burke and Freeman found that the majority should have first determined the issue on which leave to appeal had been granted – whether Rule 604(a)(1) applies in juvenile delinquency proceedings, instead of focusing on the secondary question of whether the order “suppressed” evidence.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Crossley, 2011 IL App (1st) 091893 (No. 1-09-1893, 12/7/11)

Supreme Court Rule 604(a) allows the State to appeal from an order suppressing evidence in a criminal case. An order suppresses evidence within the meaning of the rule when it prevents the information from being presented to the trier of fact. An order that only affects the means by which the State may present information does not suppress evidence.

The State appealed from an order denying its petition to certify as a material witness the keeper of records at a hospital where defendant’s blood was drawn after an accident. The

State sought the records as a necessary step to prove that a trained phlebotomist drew the blood under the supervision of a licensed physician, and that the state trooper took the correct sample into custody for transportation to the state crime lab.

The denial of the State's petition did not affect the State's ability to call the phlebotomist and the trooper as witnesses, who were the only witnesses that the defense contended the State needed to call to meet the foundation requirements for admitting the blood-alcohol test results. Because the order appealed from did not prevent the State from presenting evidence, the order did not suppress evidence.

The court dismissed the appeal on the ground that it lacked jurisdiction to hear the appeal.

People v. Mendiola, 2014 IL App (4th) 130542 (No. 4-13-0542, 3/4/14)

1. In criminal cases, the State may appeal from an order or judgment which has the substantive effect of dismissing a charge, arresting judgment, quashing an arrest or search warrant, or suppressing or excluding evidence. (Sup. Ct. Rule 604(a)(1)). Generally, the notice of appeal is due within 30 days after entry of judgement. (Sup. Ct. Rule 606(b)).

2. Before defendant's trial on four counts of aggravated criminal sexual abuse and one count of predatory criminal sexual assault of a child, the State filed a motion *in limine* to admit the recording of a telephone call between defendant and the mother of the complainants. After the motion was denied, the cause proceeded to a jury trial. The trial resulted in acquittals on the four counts of aggravated criminal sexual abuse and a hung jury on the single count of predatory criminal sexual assault of a child. A mistrial was declared on that count.

Before the retrial on the remaining count, the State again filed the motion *in limine* seeking to introduce the recording. The trial court again denied the motion, and the State filed a notice of appeal.

The Appellate Court concluded that it lacked jurisdiction to consider the appeal because the State did not appeal before the first trial. The court found that under **People v. Nelson**, 377 Ill.App.3d 1031, 880 N.E.2d 1096 (1st Dist. 2007), the State waived its right to appeal the trial court's denial of the motion when it elected to proceed with the first trial rather than appeal the pretrial ruling. "The State forfeited its right to appeal based on the supposed substantial impairment of its case when it decided to prosecute defendant."

3. The court rejected the argument that the trial court's ruling occurred after the first trial had started, at which time the State could have appealed only rulings on motions to suppress illegally seized evidence. (725 ILCS 5/114-12(c)). Because the trial court denied the motion *in limine* after *voir dire* had started but before any jurors had been sworn, jeopardy had not attached. Thus, the denial constituted a pretrial ruling.

The appeal was dismissed for lack of jurisdiction.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Phillips, 2011 IL App (2d) 101142 (No. 2-10-1142, 12/29/11)

Illinois Supreme Court Rule 604(d) permits the State to appeal from an order or judgment the substantive effect of which results in suppressing evidence. While pretrial orders suppressing evidence have a preclusive effect and are generally appealable, different rules apply for mid-trial orders resulting in the suppression of evidence, because such orders have a disruptive effect on ongoing trials and burden the defendant.

The State may obtain review of a mid-trial suppression order where the order granted a defense motion to suppress evidence on the ground that it was illegally obtained. If the

defense motion to suppress did not allege that the evidence was illegally obtained, the State can only seek review of the trial court's authority to entertain the motion to suppress during the trial and not of the merits of the trial court's ruling.

The circuit court granted defendant's mid-trial motion to strike the results of defendant's breath test on a ground other than that the evidence was illegally obtained. The circuit court properly considered the motion to strike mid-trial because the State did not turn over to the defense the affidavits on which defendant based his motion until after the bench trial had commenced. Defendant could not have objected to the results until trial, and the court ruled promptly when defendant made his objection.

Having decided that the circuit court properly entertained the motion to strike during trial, the Appellate Court dismissed the State's appeal from the merits of the court's ruling.

People v. Sedlacek, 2013 IL App (5th) 120106 (No. 5-12-0106, 3/28/13)

Supreme Court Rule 604(a)(1) allows the State to obtain review of an order or judgment the substantive effect of which results in suppressing evidence. For purposes of Rule 604(a)(1), there is no substantive distinction between evidence that is excluded and evidence that is suppressed. The pertinent question in determining whether jurisdiction exists under Rule 604(a)(1) is whether the order, in fact, is one that suppresses or excludes evidence.

The State was entitled to appeal from an order directing that the State's expert record his examination of the defendant on the issue of insanity. The State's expert had indicated that he would not conduct the examination if it was required to be recorded. Therefore the substantive effect of the order was to prevent the State from obtaining information that it was otherwise entitled to use. When an order prevents information from being presented to the trier of fact, evidence is suppressed, and the State may appeal from that order.

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Record on Appeal

§2-5(a)

For Indigents

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§2-5(b)

Sufficient Record

People v. Henderson, 2013 IL 114040 (No. 114040, 5/23/13)

The court rejected the State's argument that the record was insufficient to determine whether a vehicle stop was improper, and that defendant should raise the issue in post-conviction proceedings so he could develop a more complete record. The court noted that in the Appellate Court the State conceded that the trial record was sufficient to reach the issue, and that it claimed the record was insufficient only after it lost the issue in the lower court. "[T]he State cannot assert a new theory inconsistent with the position it adopted in the appellate court."

In addition, during oral argument the State conceded that had defendant first

challenged the legality of the traffic stop in a post-conviction petition, it would have sought dismissal of the petition on the ground that the issue should have been raised on direct appeal. (Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Patterson, 2014 IL 115102 (No. 115102, 10/17/14)

To preserve an appellate claim concerning the denial of a request to admit evidence, a party is required to make a detailed and specific offer of proof if the record would otherwise be unclear.

In defendant's trial for aggravated criminal sexual assault, complainant testified that defendant forced her to have vaginal intercourse, while defendant claimed that there had been no intercourse. The treating physician, a State's witness, testified that complainant had some cervical redness consistent with sexual intercourse.

Defendant attempted to introduce evidence that sperm (which did not belong to defendant) was found in complainant's vagina to show that she had engaged in sexual intercourse with someone other than defendant in the days prior to the assault. Defendant argued that although such evidence would normally be barred by the rape shield statute, he had a constitutional right to introduce such evidence to refute the inference that complainant had recent sexual intercourse with defendant by presenting evidence that she had intercourse with someone else within 72 hours, which was about the amount of time, defense counsel asserted, that sperm lasts in the vagina.

The court held that defendant failed to provide an adequate offer of proof to create an appealable issue. The sole support for the proffered evidence was counsel's speculation that complainant's cervical inflammation occurred three days before the alleged assault because sperm could persist for 72 hours. Counsel offered no medical testimony to support his bare assertion about the longevity of sperm or about the general persistence of cervical inflammation.

The court rejected defendant's reliance on medical sources cited in the State's appellate brief indicating cervical inflammation can last three days. It was trial counsel's burden to provide a sufficiently detailed offer of proof at trial, not months or years later on appeal. When evaluating an evidentiary ruling for abuse of discretion, the reviewing court must evaluate that discretion in light of evidence actually before the trial judge.

Since defendant did not provide a sufficient offer of proof, his claim was not subject to appellate review.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

People v. Dodds, 2014 IL App (1st) 122268 (No. 1-12-2268, 2/27/14)

In an appeal from the denial of a §2-1401 challenge to a 10-year-old guilty plea, the court noted that the parties had been unable to locate the common law record from the original proceedings. The court elected to proceed solely on the limited record before it but limited its consideration to facts which were undisputed by the parties

People v. Henderson, 2011 IL App (1st) 090923 (No. 1-09-0923, 11/17/11)

1. Courts generally will not review moot issues. The purpose of this rule is to avoid consideration of cases where the parties no longer have a personal stake in the case's outcome. A case can become moot due to a change in circumstances while an appeal is pending.

There are three exceptions to the mootness doctrine: (1) the public-interest exception; (2) the capable-of-repetition-yet-evading-review exception; and the collateral-consequences exception. The public-interest exception permits a court to consider an otherwise moot issue when: (1) the question presented is of a public nature; (2) an authoritative determination is

necessary for future guidance of public officers; and (3) a likelihood exists that the question will recur.

The defendant's appeal from the dismissal of his post-conviction petition became moot due to defendant's completion of service of his sentence, including his MSR term. The question of whether the trial court can summarily dismiss a *pro se* post-conviction petition due to an unnotarized verification affidavit nonetheless could be reached under the public-interest exception.

The question of whether the trial court can summarily dismiss a petition due to an unnotarized verification affidavit is a question of a public nature that affects a large number of criminal defendants who file petitions every year. An authoritative determination is necessary for the future guidance of trial court judges, who are public officers. A likelihood exists that the issue will arise in the future in light of the sheer volume of petitions being filed and "the fact that this is at least the second case this year in which the State has argued that this is an appropriate basis for first-stage dismissal."

2. A void judgment may be attacked directly or collaterally in any court at any time. Although a reviewing court is not vested with authority to consider the merits of a case merely because the dispute involves an order that is or is alleged to be void, the lack of standing to file a post-conviction petition is not a jurisdictional defect that deprives the court of the authority to consider the merits of an argument that a judgment is void.

3. Generally, it is appellant's burden to properly complete the record on appeal. Any doubts arising from the incompleteness of the record will be construed against the appellant and in favor of the judgment rendered in the lower court. This rule is relaxed where the defendant can prove that the record is incomplete due to no fault of his own, as well as demonstrate that there is a colorable need for the missing portion of the record in order to have appellate review. If defendant can establish both prongs, the State then must show that there are other means to afford adequate review.

The indictment was not included in the record on appeal and both parties' efforts to locate a copy of the indictment were unsuccessful. The indictment was relevant to defendant's argument that his criminal conviction was void as it did not allege an offense that was subject to transfer from juvenile to criminal court. However, the court concluded that defendant had not established a colorable need for the indictment as his claim that he was not charged with a transferable offense was based on speculation.

Defendant conceded that he did not know the exact language used in the indictment. He conceded that he may have committed a transferable offense. "Thus it appears from defendant's argument that it is equally probable that an error did or did not occur but he asks us to assume the former." Defendant's decision to waive reading of the indictment, and not to challenge his transfer to criminal court, even after it was questioned why defendant was before the criminal court, suggests that counsel's review of the indictment revealed no defects. "We will not equate defendant's fishing expedition with a colorable need for the indictment."

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Hernandez, 409 Ill.App.3d 294, 949 N.E.2d 1139 (2d Dist. 2011)

Generally, a reviewing court must resolve any doubt arising from the incompleteness of the record against the appellant. Both an agreed statement of facts and a bystander's report require the participation of both parties and therefore both parties bear responsibility for the report's accuracy. Accordingly, a court will presume that an agreed statement of facts or a bystander's report is materially complete on the points it addresses. If an appellee concludes that material facts are absent, it has the ability and responsibility to see that they are added.

Where there were no transcripts of the proceedings and the parties filed an agreed statement of facts that was insufficient with respect to a jury waiver, the court presumed that it had a proper record of any facts material to the issue of waiver of jury, rejecting the State's request that it presume that the defendant had validly waived his right to a jury trial.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Hill, 2014 IL App (3d) 120472 (Nos. 3-12-0472 & 3-12-0473, 3/13/14)

1. Defendant argued that the trial court improperly required him to pay a \$200 DNA analysis fee. The Appellate Court observed that defendant did not preserve the error in the trial court. Typically defendants avoid the consequences of forfeiture by arguing that the sentence is void, but defendant did not argue voidness in this case. Nonetheless, in the interest of maintaining a uniform body of law, the Court *sua sponte* considered whether the imposition of the DNA fee was void.

2. In arguing that the DNA fee was improperly imposed, defendant relied on an information sheet provided by the ISP Division of Forensic Services showing that defendant submitted a blood sample for analysis on July 11, 1995. The Court held that although this document was not presented to the trial court, it would take judicial notice of it as a public record. The Court therefore recognized that defendant submitted a DNA sample in 1995.

3. The Court refused to consider information from the website "judici.com," in deciding whether defendant was improperly assessed two DNA fees. Instead, the Court relied exclusively on the clerk's "payment status information," included in the common law record. The Court noted that printouts from "judici.com," were appended to the brief, but were not part of the record on appeal. The Court cautioned the parties against attempting to supplement the record with information from the internet without first obtaining leave of the Court.

(Defendant was represented by Assistant Defender Gabrielle Green, Chicago.)

People v. Jimerson, 404 Ill.App.3d 621, 936 N.E.2d 749 (1st Dist. 2010)

Comparing the record on appeal of a co-defendant with defendant's record, the court inferred that all of the written instructions submitted to the jury were not contained in the record on appeal. Therefore, the court refused to conclude that the jury was given no written self-defense instructions merely because no such instructions were contained in the record on appeal.

The court orally instructed the jury on self-defense, but no written self-defense instructions appeared in the record on appeal. The defense argued that this inconsistency in the oral and written instructions confused the jury. The court noted that it appeared that neither the defendant's record nor the co-defendant's record contained a complete set of the written instructions. The co-defendant's record contained the written self-defense instruction, but did not contain a different instruction that was contained in defendant's record. This supported the inference that the jury left some of the instructions in the jury room when it returned its verdict.

(Defendant was represented by Assistant Defender Jessica Hunter, Chicago.)

People v. Liekis, 2010 IL App (2d) 100774 (No. 2-10-0774, 7/31/12)

1. Defendant's filing of a motion to modify the conditions of conditional discharge did not revest jurisdiction in the trial court. The motion had no effect on defendant's previously-filed timely notice of appeal from his conviction. A motion to modify the conditions of conditional discharge is not a motion to reconsider the sentence. The trial court retains

jurisdiction to modify the conditions of conditional discharge. 730 ILCS 5/5-6-4(f).

2. The doctrine of invited error or acquiescence is a form of procedural default or estoppel. It provides that a party may not request the court to proceed in one manner and then argue on appeal that the requested action was error. The rationale of the doctrine is that it would be unfair to grant relief to a party based on error that the party introduced into the proceedings.

The State was not barred by the doctrine of invited error from arguing on appeal that the defense had not met its burden at the hearing on a motion to suppress. The defense and not the State argued that the defense had met its burden and that the burden shifted to the State. The State disagreed that the burden had shifted, and merely acquiesced to the court's judgment as to whether the defense had met its burden.

3. The appellant bears the burden of preserving and presenting an adequate record of the asserted error. Any doubts arising from the inadequacy of the record must be resolved against the appellant.

Where defendant claims that she did not waive the right to trial by jury in open court, she must present a record that sufficiently covers all proceedings that could have involved the waiver. Without an adequate record, the reviewing court must assume that the record indications of a jury waiver are indeed based on a valid waiver.

Defendant presented an incomplete record on the issue of jury waiver. The half sheet indicated that on the day that a stipulated bench trial was conducted, "jury trial [was] waived." The agreed statement of facts indicated that defense counsel moved for a stipulated bench trial and that a stipulated bench trial was conducted immediately following the court's denial of defendant's motion to reconsider. No report of proceedings for that date was included in the record. In the absence of a report of proceedings or acceptable substitute, the court assumed that the record indications of a jury waiver were based on a valid waiver.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

People v. Pelo, 404 Ill.App.3d 839, 942 N.E.2d 463 (4th Dist. 2010)

The Appellate Court declined to address the issue of whether defense counsel was ineffective for failing to offer a limiting instruction, finding that it was better pursued on post-conviction rather than direct appeal because the record was silent regarding counsel's strategy in failing to offer the instruction.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Reed, 2013 IL App (1st) 113465 (No. 1-11-3465, 12/31/13)

The record was insufficient to allow the Appellate Court to review the trial court's reasons for denying a motion for disclosure of the secret surveillance location of an officer who testified that he observed a drug offense. When the motion for disclosure was filed, the trial court held an *in camera* interview of the officer. That proceeding was not transcribed, however, and defendant failed to ask the trial court to clarify its reasoning or state its findings with greater specificity.

Although surveillance location cases often involve *in camera* proceedings and incomplete records, it is the burden of the appellant to provide the reviewing court with a record that is adequate to support any claims of error. In the absence of an adequate record, all doubts are resolved against the appellant. In such cases, the trial court's ruling is presumed to have a sufficient legal and factual basis.

(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

People v. Shines, 2014 IL App (1st) 121070 (No. 1-12-1070, 2/4/15)

More than 30 days after he had been sentenced, defendant filed a *pro se* letter titled “motion of appeal” in the trial court alleging that counsel had been ineffective. The trial court took no action on the letter. The Illinois Supreme Court eventually granted defendant’s motion for supervisory order directing the Appellate Court to allow defendant’s letter “to stand as a validly filed notice of appeal.”

Defendant argued on appeal that the trial court failed to conduct a **Krankel** hearing on defendant’s *pro se* claims of ineffectiveness. The Appellate Court held that since defendant’s letter was filed more than 30 days after the final judgment, the trial court no longer had jurisdiction to rule on defendant’s claims. The trial court entered the final judgment on March 7 when it sentenced defendant and lost jurisdiction on April 6. Defendant filed his letter on April 9, more than 30 days after the final judgment had been entered.

Defendant argued that his letter was timely filed under the mailbox rule, which holds that pleadings are timely filed on the day an incarcerated defendant places them in the prison mail system. In support of his argument, defendant asked the Appellate Court to take judicial notice of an affidavit from a paralegal who averred that a manager at the prison where defendant was incarcerated informed her that defendant’s letter was mailed on April 3. Defendant attached the affidavit, which had originally been submitted with his motion for supervisory order, as an exhibit to his reply brief.

The court refused to take judicial notice of the affidavit. It held that it could not properly consider attachments to briefs that were not included in the record. Additionally, the content of the affidavit was entirely hearsay and thus insufficient to establish the date of mailing.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Sims, 403 Ill.App.3d 9, 931 N.E.2d 1220 (1st Dist. 2010)

The Appellate Court dismissed defendant’s direct appeal of his conviction in March 1993 due to the failure of his counsel to file the record on appeal. In September 1993, defendant’s attorney signed for and received the common law record. Defendant learned in November 1994 that his appeal had been dismissed. In 1996, defendant filed a *pro se* motion to reinstate his appeal in the Appellate Court and a *pro se* motion to file a late notice of appeal in the Supreme Court. Both motions were denied. In 2006, defendant filed a *pro se* post-conviction petition, which ultimately led to his being permitted to file a late notice of appeal in 2009. At that point, the common law record and jury selection proceedings could not be located or reconstructed.

1. As a general rule, a defendant is obligated to provide a complete record for review of his appellate claims. This rule is relaxed where defendant is not at fault for the incompleteness and the missing record is material to meaningful review of his contentions on appeal. Defendant contended he was denied his right to meaningful appellate review where through no fault of his own the record on appeal was incomplete. The Appellate Court acknowledged that the incompleteness of the record was not the fault of the defendant and that the missing records could not be reconstructed. It denied any relief to defendant because he had not established that the missing records were material to meaningful review of his appeal. Defendant could not identify any specific error that occurred in the missing records. It was not enough that as a result of the missing record it could not be determined whether or not an error occurred.

2. Delay of an appeal can violate due process. To determine whether delay violates due process, courts utilize the four-part test of **Barker v. Wingo**, 407 U.S. 514 (1972), designed

to address violations of defendant's Sixth Amendment right to a speedy trial. Those factors are: (1) length of the delay; (2) reason for the delay; (3) defendant's responsibility to assert his right; and (4) the resulting prejudice to defendant. Applying these factors, the court found no violation of defendant's right to due process. The court acknowledged that the 17-year delay did merit further inquiry and the initial delay of the appeal was due to ineffective assistance of counsel. But the court also found that defendant was responsible for the delay from 1994 when defendant learned the appeal was dismissed, until 1996, when he filed *pro se* motions. The record was silent as to any action taken by defendant from 1996 until 1999, and from 2000 until 2006, during which times he took no action. Moreover, defendant suffered no prejudice. The loss of records did not interfere with meaningful appellate review of his conviction, and defendant endured no unlawful incarceration, as the court concluded no error occurred at his trial.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

Village of Mundelein v. Bogachev, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-10-0346, 5/27/11)

To the extent that the record is incomplete, any resultant ambiguity is construed against the appellant.

The State as appellant challenged the trial court's order granting the defense motion to dismiss on speedy-trial grounds. The only transcript that the State included in the record was the transcript of the hearing on the defense motion to reconsider the trial court's original ruling on the defense motion to dismiss.

Because the Appellate Court lacked any transcripts that might shed light on why the court delayed the hearing on the defense pretrial motion to suppress, and the trial court had concluded that the hearing had been continued on the court's own motion, the Appellate Court found it had no basis to conclude that the delay in the processing of the motion should have been charged to defendant.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

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§2-5(c)

Amendment or Correction

People v. Corredor, 399 Ill.App.3d 804, 927 N.E.2d 1231 (2d Dist. 2010)

1. Under **People v. Shellstrom**, 216 Ill.2d 45, 833 N.E.2d 863 (2005), the trial court may recharacterize a *pro se* pleading as a post-conviction petition only after advising the petitioner that it intends to make the recharacterization, that any subsequent post-conviction petition will be subject to the restrictions on successive post-conviction petitions, and that the petitioner may elect to either withdraw or amend the pleading. The court concluded that the **Shellstrom** rule applies to the recharacterization of any *pro se* pleading, whether or not the initial filing is "cognizable" under Illinois law.

2. Alternatively, a motion for order *nunc pro tunc* to require DOC to grant sentencing credit that had been ordered by the trial court is "cognizable" under Illinois law. The trial court has limited continuing jurisdiction to conform the record to the judgment actually entered, and could do so through either a motion for an order *nunc pro tunc* or a motion to correct the mittimus.

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. Garvin, 2013 IL App (1st) 113095 (No. 1-11-3095, 8/7/13)

Generally, attachments to briefs that were not included in the record on appeal are not properly before the reviewing court and cannot be used to supplement the record. Material omissions in the record may be corrected by using the procedures set forth in Supreme Court Rule 329.

The State attached to its brief a probation agreement signed by the defendant, which it contended constituted a waiver of any constitutional challenge to his conviction. The State contended that the defendant's failure to raise the constitutional challenge until appeal had prevented it from demonstrating that defendant had under the agreement voluntarily relinquished his right to assert the constitutional challenge.

While agreeing that the agreement was relevant to defendant's constitutional challenge, the Appellate Court refused to consider the agreement. If the State wanted the court to consider the agreement, it should have moved to have it properly included in the record on appeal. By failing to make the agreement a part of the record, the State precluded the court's consideration of it on review.

(Defendant was represented by Assistant Defender Darrel Oman, Chicago.)

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§2-6

Miscellaneous

§2-6(a)

Issues Reviewable

Florida v. Powell, ___ U.S. ___, 130 S.Ct. 1195, 175 L.Ed.2d 1009 (2010) (No. 08-1175, 2/23/10)

1. The United States Supreme Court will decline to review a state court decision which rests on a State ground that is independent of the federal question and adequate to support the judgment. Where the state court decision fairly appears to rest primarily on federal law or to be interwoven with federal law, or when the adequacy and independence of a possible state ground is not clear from the face of the opinion, the Supreme Court will presume that the state court believed that it was required by federal law to decide the case the way it did.

By contrast, if the state court decision clearly and expressly states that it is alternatively based on a *bona fide* separate, adequate and independent ground, the Supreme Court will not grant review.

2. There was no independent and adequate state ground for the Florida Supreme Court's **Miranda** decision where the court invoked the Florida constitution but also treated State and federal law as interchangeable and interwoven. At no point did the Florida Supreme Court expressly state that State law gives a Florida citizen rights that are distinct from or broader than those afforded by the federal constitution.

Thus, the court had jurisdiction to consider the question. (See also **CONFESSIONS**, §10-3(a)).

In re Brandon P., 2014 IL 116653 (No. 116653, 5/22/2014)

The State conceded at trial, in the Appellate Court, and in the Illinois Supreme Court that the three-year-old complainant was unavailable to testify at trial for purposes of §115-10. (725 ILCS 5/115-10) Despite the State's concession of error, the Supreme Court specifically addressed the Appellate Court's refusal to accept the State's concession and its erroneous finding that the witness was available for cross-examination.

Although a reviewing court is not bound by a party's concession, the Appellate Court erred by rejecting the State's concession and addressing the issue *sua sponte*. The Appellate Court ignored settled law by conducting its own *de novo* review of the complainant's availability instead of reviewing the trial court's ruling for abuse of discretion. The Appellate Court also ignored direct precedent from the Supreme Court holding that fear and youth are relevant factors in deciding whether a child witness is available to testify under §115-10. **People v. Stechly**, 225 Ill. 2d 246 (2007).

The Supreme Court concluded that "[t]here is no question, based on the record in this case, that [the complainant] was unavailable to testify at respondent's trial based upon both her youth and fear." The Appellate Court thus erred in rejecting the State's concession and finding that the complainant was available.

(Respondent was represented by Assistant Defender Catherine Hart, Springfield.)

People v. Aguilar, 2013 IL 112116 (No. 112116, modified 12/19/13)

To have standing to contest the constitutionality of a statute, the party bringing the challenge must show that he falls within the class of persons aggrieved by the alleged unconstitutionality. When the defendant argues that a statute is facially unconstitutional and cannot be enforced against anyone, he has standing to make that challenge if he has sustained or is in immediate danger of sustaining some direct injury as a result of enforcement of the statute.

Defendant challenged certain firearm statutes as unconstitutional because they facially violated the Second Amendment. Because defendant was convicted under the provisions of those statutes, he had standing to challenge their constitutionality.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

People v. Alcozer, 241 Ill.2d 248, 948 N.E.2d 70 (2011)

A party forfeits an issue that he has not raised in his petition for leave to appeal or before the Appellate Court. Where an issue is not specifically mentioned in a petition for leave to appeal, review is appropriate where the issue is inextricably intertwined with other matters properly before the court.

Where the challenge to the constitutionality of a statute depends on the construction of the statute, the construction of the statute is inextricably intertwined with the constitutional issue. Therefore, an argument on the interpretation of a statute directly related to a constitutional challenge is not forfeited even if it is not raised in the petition for leave to appeal.

(Defendant was represented by Assistant Defender Kerry Goettsch, Chicago.)

People v. Bailey, 2014 IL 115459 (No. 115459, 2/6/14)

1. Under the revestment doctrine, a court may regain jurisdiction after the time for filing a post-judgment challenge has expired. The revestment doctrine applies where the parties actively participate, without objection, in proceedings which are inconsistent with the merits of an earlier judgment.

The revestment doctrine is interpreted narrowly, and may apply if both parties seek to modify or overturn the prior judgment. However, the doctrine is inapplicable where a party opposes modification of the existing judgement, even if that party failed to object to the timeliness of a late challenge.

2. The revestment doctrine did not apply here. Although the State failed to object on timeliness grounds when defendant moved to vacate his plea more than three years after the plea was entered, it actively opposed any modification of the conviction and sentence. The court stated that the State's "attempt to defend the merits of the prior judgment cannot be viewed as being inconsistent with that judgment."

Because the State opposed the motion to withdraw the plea, it did not assert a position that was inconsistent with the merits of the prior judgment. Because the criteria for the revestment doctrine was not satisfied, the trial court should have dismissed the motion to withdraw the plea instead of considering it on the merits.

3. The court added that the Appellate Court erred by dismissing the appeal for lack of jurisdiction, because that order left intact the trial court's improper exercise of jurisdiction. Once the Appellate Court found that it lacked jurisdiction to consider the appeal, it should have vacated the trial court's judgment and ordered that the motion to withdraw the plea be dismissed.

4. The court rejected the State's argument that the revestment doctrine should be abolished in criminal cases because it conflicts with the need for finality in judgements and the rule establishing deadlines for filing jurisdictional post-judgment motions. The court found that the doctrine, which has been applied in criminal cases since at least 1983, should not be abolished in the absence of a demonstration of good cause or the identification of compelling reasons. "The inherent conflict between a rule and its exception does not meet that high standard."

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Bartelt, 241 Ill.2d 217, 948 N.E.2d 52 (2011)

1. After noting that the case presented an issue of first impression nationwide, the Supreme Court found that the only issue properly before it was whether a "set-up procedure," which was conducted before a canine sniff to make it easier for the dog to sniff outside a vehicle, constituted an illegal "search." The court refused to consider whether ordering the defendant to comply with the set-up procedure constituted an unreasonable "seizure."

The court interpreted the defendant's briefs as raising only a "search" issue, and stated that the "seizure" question would be held "for a case where the issue is properly before us and has been fully briefed and argued."

2. In a dissenting opinion by Justice Freeman, three justices (Freeman, Burke and Theis) noted that the defendant's brief expressly stated that the set-up procedure converted the traffic stop into an impermissible "seizure." The dissent also noted that the issue had been litigated in the suppression hearing and expressly ruled upon by the trial court. The dissent concluded that by treating the case as presenting only a "search" issue, "[t]he majority . . . answers a question not presented by this appeal, and declines to address the question squarely raised. . . ."

The dissent added that because the issue was novel and a matter of first impression, "it is . . . not surprising that both parties - as well as the courts - have struggled in defining the precise contours of the proper arguments and analysis." The dissenters also stated that drawing a strict waiver construction based on a distinction between "search" and "seizure" is especially inappropriate because the parameters of the Fourth Amendment are intentionally

imprecise to allow a practical, case-by-case approach.

The trial court's suppression order was reversed, and the cause was remanded for further proceedings.

(Defendant was represented by Assistant Defender Arden Lang, Springfield.)

People v. Clark, 2014 IL 115776 (No. 115776, 3/20/14)

Defendant did not waive an argument that the eavesdropping statute was overbroad under the First Amendment although he failed to raise that argument in the trial court. Generally, a constitutional challenge to a statute may be raised at any time. However, the State argued that a different rule should apply to First Amendment overbreadth arguments because such arguments are based on the possibility that the rights of third parties may be affected by an overbroad statute.

Noting that the State failed to cite any authority supporting its argument, the court declined to create a special rule for First Amendment overbreadth cases.

People v. Dabbs, 239 Ill.2d 277, 940 N.E.2d 1088 (2010)

Under Supreme Court Rule 341(h)(7), points raised but not argued are waived. The court found that the defendant abandoned an equal protection claim which he raised in the petition for leave to appeal but failed to argue in the opening or reply brief or at oral argument.

(Defendant was represented by Assistant Defender Michelle Zalisko, Mt. Vernon.)

People v. Denson, 2014 IL 116231 (No. 116231, 11/20/14)

1. In criminal cases, an issue is preserved for review if it is raised in either a motion *in limine* or a contemporaneous trial objection and is included in the post-trial motion. Where the State filed a motion *in limine* to admit co-conspirator statements as an exception to the hearsay rule, defendant filed a response, and the trial court granted the motion *in limine* after a full hearing, the issue was preserved although defendant did not file his own motion *in limine*. The court stressed that the forfeiture rule is intended to encourage defendants to raise issues in the trial court, ensure that the trial court has an opportunity to correct any errors before the case is appealed, and prevent defendant from obtaining a reversal through his or her own inaction. In light of these purposes, the critical consideration is not which party initiated the motion *in limine*, but whether the issue was in fact litigated in the trial court:

Under these circumstances, requiring defendant to recaption and refile his response to the State's motion as a motion *in limine* of his own would accomplish precisely nothing, other than to clutter the record with duplicative pleadings. Because the trial court was given a full and fair opportunity to rule upon the issue through the State's motion *in limine* and the defendant's response, the issue was preserved when defendant placed it in his post-trial motion, without any need to file his own motion *in limine*.

2. Furthermore, where statements were admitted after the State's motion *in limine* was granted, defendant was not required to offer a contemporaneous objection when the evidence was presented at trial. Instead, defendant preserved the issue by filing a response to the motion *in limine* and placing the issue in the post-trial motion.

The court acknowledged that in civil cases, a contemporaneous trial objection is required to preserve an issue that has been litigated in a motion *in limine*. In criminal cases, by contrast, the issue must be included in the post-trial motion but need not be the subject of

a contemporaneous objection at trial. The court explained the difference in procedure by noting that a post-trial motion is required in all criminal cases but may or may not be required in civil cases.

The court also criticized the State for taking inconsistent positions in the trial court and on appeal. In the lower court, the State indicated that its purpose in filing the motion *in limine* was to avoid having the defense raise an objection at trial that would require the trial to be interrupted. “Given this, we have some difficulty now entertaining the State’s argument that defendant forfeited review of the contested statements by failing to make a contemporaneous trial objection, when insulating those statements from a contemporaneous trial objection was the State’s express objective. . . .” The court added, “[W]e in no way can condone the State’s maneuvering in this case, and we strongly discourage the State from proceeding this way in the future.”

(Defendant was represented by Assistant Defender Chris McCoy, Elgin.)

People v. Givens, 237 Ill.2d 311, 934 N.E.2d 470 (2010)

1. Except for assuring that it has subject matter jurisdiction, a reviewing court should not search the record for unargued and unbriefed reasons to reverse a trial court judgment. Where defendant raised four arguments, the Appellate Court erred by reversing the conviction on an unbriefed issue - that trial counsel was ineffective for failing to challenge a consensual search on the ground that a tenant lacks authority to consent to a search of her bedroom while it is occupied by an overnight guest.

2. Although a reviewing court may sometimes raise and decide unbriefed issues to provide a just result and maintain a sound and uniform body of precedent (S. Ct. Rules 341(e)(7), 366(a)), this was not an appropriate case in which to do so. First, because the issue had not been presented at trial, the parties did not present evidence concerning the tenant’s authority to consent. The factual record that was created concerning other issues was not necessarily complete concerning the authority-to-consent issue, and both parties might have presented different evidence had the issue been joined.

In addition, where the defendant and his appellate attorney decline to raise an issue concerning trial counsel’s ineffectiveness, it is generally presumed that the record would not have supported the argument.

Second, the issue raised *sua sponte* by the Appellate Court was not obvious error supported by clear precedent. The precedent relied upon by the Appellate Court contained language contradicting the Appellate Court’s holding, and the State’s petition for rehearing cited several cases which called into question the correctness of the court’s reasoning.

The Appellate Court’s holding concerning ineffective assistance of counsel was vacated.

3. See also, **COUNSEL**, §13-4(b)(4) & **NARCOTICS**, §35-3(c)(1).

(Defendant was represented by former Assistant Defender Elizabeth Botti, Chicago.)

People v. Hopkins, 235 Ill.2d 453, ___ N.E.2d ___ (2009) (No. 106683, 12/17/09)

After the cause was remanded to the trial court for an attenuation hearing, the trial court found that defendant’s statement was attenuated from the illegal arrest. The Appellate Court agreed, and defendant’s leave to appeal was granted. The State then sought cross-relief and contended for the first time that in the first appeal, the Appellate Court had erroneously held that the police lacked probable cause for defendant’s arrest. The Supreme Court found that the State could raise the probable cause issue by cross-appeal, and that the Appellate Court erred by finding a lack of probable cause.

1. The State did not “waive” its right to challenge the Appellate Court’s finding of no

probable cause by failing to file a petition for leave to appeal rather than proceeding with the attenuation hearing. Supreme Court Rule 318(b) provides that interlocutory review is not favored, and that failure to seek review of a non-final disposition by the Appellate Court does not waive the right to present any issue in an appropriate court thereafter. Because the Appellate Court remanded the cause for an attenuation hearing and suggested that the State “had a good chance of establishing attenuation” on remand, the State had no obligation to seek leave to appeal at that point.

2. Furthermore, the State did not waive its right to challenge the Appellate Court’s probable cause determination on the first appeal by failing to file its own leave to appeal following the Appellate Court’s resolution of the appeal from the finding on remand. Supreme Court Rule 318(b) provides that an appellee may seek any relief warranted by the record “without having filed a separate petition for leave to appeal or notice of cross-appeal or separate appeal.” Because the State was the appellee in defendant’s appeal from the Appellate Court’s second holding, it was under no obligation to file its own petition for leave to appeal or notice of cross-appeal.

3. Neither collateral estoppel nor the “law of the case” doctrine preclude the State from challenging the probable cause finding.

A. Collateral estoppel bars relitigation of an issue which has been decided in a prior case, and applies when: (1) a party participates in two separate and consecutive cases arising from separate causes of action, and (2) some controlling fact or question material to determination of both causes was adjudicated against that party in the former case. Collateral estoppel does not apply to multiple direct appeals after the cause has been remanded to the trial court – as there is but one cause of action.

Furthermore, the collateral estoppel doctrine requires a final judgment on the merits in the prior adjudication. There is no final judgment where a single cause of action is considered at different stages of the appellate process.

B. The “law of the case” doctrine, by contrast, bars relitigation of an issue which was previously decided by the same court in the same case. The “law of the case” doctrine does not prevent the Supreme Court from considering issues which were previously decided by the Appellate Court - the Supreme Court may consider all matters “properly raised and passed on in the course of the litigation.”

4. Finally, the Appellate Court erred by finding that the officer lacked probable cause for the arrest. (See **SEARCH & SEIZURE**, §§44-4(b), 44-6(d)).

(Defendant was represented by Assistant Defender Doug Hoff, Chicago.)

People v. Horrell, 235 Ill.2d 235, 919 N.E.2d 952 (2009)

The State was not estopped from arguing in the Supreme Court that a probation sentence should be upheld, although in the Appellate Court it conceded that the sentence should be vacated. A reviewing court is not bound by a party’s concession of an issue. Furthermore, a reviewing court may affirm the trial court’s judgment on any basis contained in the record. (See also **SENTENCING**, §45-9(a)).

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Hunt, 234 Ill.2d 49, 914 N.E.2d 477 (2009)

1. Neither the parties nor the reviewing court may alter the theory on which a case was tried in the trial court. Thus, the Appellate Court must refuse to consider new questions which could have been refuted had they been raised below. Here, the Appellate Court erred by *sua sponte* considering statutory and Fourth Amendment issues which had not been considered

by the trial court or argued by the parties.

The court concluded, however, that it would reach the same issues because they had been fully briefed in the Supreme Court.

2. Because the record did not support the State's assertion that the trial court had suppressed only a portion of the defendant's statements, the Appellate Court reached only the issues reached by the trial court. Thus, the Appellate Court did not exceed the scope of permissible review on interlocutory appeal. The court noted that as the appellant, the State was responsible for presenting a sufficient record to support its claim of error. (See also **SEARCH & SEIZURE**, §§44-1(a), (b)).

Because the original issue raised by the parties – whether certain statements should have been suppressed on Fifth Amendment and Illinois constitutional grounds – was not reached by the Appellate Court, the cause was remanded for further consideration.

People v. Jackson, 2013 IL 113986 (No. 113986, 2/7/13)

In general, courts should not reach constitutional issues where a case may be resolved on nonconstitutional grounds. Because the parties agreed that a defendant charged with driving with a suspended license could present evidence of the circumstances under which a second driver's license had been obtained, and the trier of fact would be required to determine whether the defendant misled authorities into reinstating his driving privileges, the trial judge erred by finding that the driving while license suspended statute violated due process because it precluded defendant from introducing evidence that he had not committed fraud in obtaining the second license.

(Defendant was represented by Assistant Defender Dan Evers, Mt. Vernon.)

People v. Kennebrew, 2013 IL 113998 (No. 113998, 3/21/13)

1. Supreme Court Rule 615(b)(3) authorizes a reviewing court to reduce the degree of the offense of which the defendant was convicted. Rule 615(b)(3) is intended to allow the court to reduce a conviction to a lesser offense where the evidence is insufficient to prove an element of the greater offense beyond a reasonable doubt. The court concluded that the authority provided by Rule 615(b)(3) allows a reviewing court to reduce a conviction even where the lesser offense was not charged or the State failed to request an instruction on the lesser offense at trial.

2. After the Appellate Court reversed defendant's predatory criminal sexual assault conviction on reasonable doubt grounds, the State filed a petition for leave to appeal asking that the Appellate Court be directed to consider the possible application of Rule 615(b)(3) to reduce defendant's conviction to aggravated criminal sexual abuse. The court concluded that it had acted within its authority by issuing a supervisory order granting that request. The State had not forfeited the possible application of Rule 615(b)(3) by failing to ask the Appellate Court to apply Rule 615 and raising the issue for the first time in its petition for leave to appeal. The court concluded that there were sound policy reasons to find that the State had not waived the issue, because "it would be unjust" for a defendant to obtain a complete acquittal where the evidence, though insufficient to sustain the greater charge, would justify a conviction on a lesser offense.

3. The court concluded that the charging instrument approach applies when determining whether a crime is a lesser offense for purposes of Rule 615(b)(3), rejecting defendant's argument that the "abstract elements" test should be applied where the jury did not consider the lesser included offense at trial.

4. In dissent, Justice Theis concluded that the Supreme Court acted improperly by

issuing a supervisory order directing the Appellate Court to consider whether Rule 615 should be applied. Because the State failed to raise any argument concerning Rule 615 until the petition for leave to appeal, the argument had been waived. Furthermore, the State's petition for leave to appeal failed to inform the Supreme Court that the State had not argued the lesser included offense to either of the lower courts. Justice Theis also noted that the Appellate Court believed that the State had forfeited the argument, but felt constrained by the supervisory order to consider it. Under these circumstances, the State had waived the argument and the Supreme Court should not have issued the supervisory order.

Justice Theis concluded:

The State had every opportunity to charge the defendant with a lesser included offense . . . as well as every opportunity to request an instruction on that offense. The State chose not to do so, opting instead for an all-or-nothing approach. This approach continued on appeal, and only gave way when the State lost and the appellate court vacated the defendant's conviction and sentence on count I. [Although] Rule 615(b)(3) allows us to reduce the degree of the offense in which the defendant has been convicted . . . our authority under that rule should be exercised with caution and circumspection, particularly where 'neither side desired to allow the jury to consider a lesser alternative to the charged violation.'"

Finally, Justice Theis stated that the majority's opinion should not be "construed as a cue to lower courts to begin scouring records, looking for uncharged lesser-included offenses of which the defendant may be guilty."

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

People v. McKown, 236 Ill.2d 278, 924 N.E.2d 941 (2010)

1. Although the results of HGN testing are admissible if a sufficient foundation is established, the HGN evidence should not have been admitted in this case because there was not a sufficient foundation to establish that the officer followed the required protocol. (See **EVIDENCE**, §19-27(a)).

2. The court rejected the State's argument that the issue had been waived. Although defendant failed to raise the issue at trial, she argued in the Appellate Court that the State failed to present an adequate foundation for the results of the HGN test. The State failed to bring the defendant's alleged forfeiture to the attention of the Appellate Court, in effect "forfeit[ing] its ability to argue forfeiture by the defendant."

3. The court also held that defendant did not waive the issue by failing to raise it in her petition for leave to appeal, which was filed before the remand for the **Frye** hearing. At that hearing, defendant attempted to introduce evidence that the officer failed to perform the HGN testing properly. When the State objected, defendant made an offer of proof.

Although an issue not raised in the petition for leave to appeal is usually waived, the court may elect to exercise review where the issue is "inextricably intertwined" with matters that are properly before the court. Whether the HGN test was performed properly was inextricably intertwined with the issue raised – whether HGN testimony is admissible at all. Thus, the court elected to review the issue.

Defendant's conviction was reversed and the cause remanded for a new trial.

People v. Nunez, 236 Ill.2d 488, 925 N.E.2d 1083 (2010)

1. The Supreme Court affirmed defendant's convictions for aggravated DUI and driving while license revoked. (See **VERDICTS**, §§55-3(a), (b)).

2. The State was not estopped from arguing an issue in the Supreme Court which it conceded in the Appellate Court; "a reviewing court is not bound by a party's concession."

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Ousley, 235 Ill.2d 299, 919 N.E.2d 875 (2009)

1. An issue is moot where intervening events have made it impossible for the reviewing court to grant effective relief. The reviewing court should not decide a case if its judgment would have only an advisory affect.

Where the issue in the lower court was whether the trial court had discretion to deny the State's motion to grant use immunity, the appeal was not rendered moot by the fact that the witness to whom the immunity was to be granted (a co-defendant) had pleaded guilty. A defendant who pleads guilty waives his privilege against compulsory self-incrimination only for the offense for which he pleads. Because the witness had been charged with multiple offenses, most of which were dropped and which could be reinstated, and because the record did not reflect whether the conviction had become final, the defendant had not waived his Fifth Amendment rights. Therefore, the appeal was not moot.

2. See also **IMMUNITY**, Ch. 28.

In re: Austin S., 2015 IL App (4th) 140802 (No. 4-14-0802, 2/9/15)

The public interest exception to the mootness doctrine allows a court to consider a moot issue when: (1) the issue is of a public nature; (2) an authoritative decision is needed to guide public officers; and (3) the issue is likely to recur. There must be a clear showing of each element for the public interest exception to apply.

Here the issue was whether the trial court's order requiring defendant to complete a Juvenile Detention Center Treatment Program was impermissible because it violated the 30-day limitation on detention under 705 ILCS 405/5-710(1)(a)(v). By the time the case reached the Appellate Court, defendant had completed his sentence and both parties agreed the issue was moot. The court nonetheless reached the issue under the public interest exception, holding that all three elements of the exception were satisfied.

First, the issue was of a public nature since it involved a question about the permissible length that a minor may be detained. Second, an authoritative decision was needed because it was an issue of first impression and it implicated the minor's liberty interest. Third, the issue was likely to recur because minors will continue to be sentenced to the treatment program at issue.

(Defendant was represented by Assistant Defender Janieen Terrance, Springfield.)

In re C.C., 2015 IL App (1st) 142306 (No. 1-14-2306, 1/6/15)

Under the extended juvenile jurisdiction statute (705 ILCS 405/5-810), upon a finding of guilty the trial court must impose a juvenile court sentence and a conditional adult criminal sentence. If the minor successfully completes the juvenile sentence, the adult sentence is vacated.

If the minor commits a new offense, the adult sentence must be implemented. In addition, if the juvenile violates the conditions of the juvenile sentence in some way other than by committing a new offense, the trial court has discretion to revoke the juvenile sentence and implement the adult sentence.

Defendant was committed to Department of Juvenile Justice until he was 21, with a

conditional adult sentence of 45 years in the Department of Corrections. He appealed, arguing that the 45-year-sentence violated the Eighth Amendment and the proportionate penalties provision of the Illinois Constitution.

The court concluded that because the State had not filed a petition to revoke the stay on the adult sentence or accused the minor of violating the conditions of his juvenile sentence, the minor had not suffered any injury due to the adult sentence. Therefore, he lacked standing to challenge that sentence.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

In re Henry P., 2014 IL App (1st) 130241 (No. 1-13-0241, 5/30/14)

Since defendant did not file a notice of appeal within 30 days of the final judgment, the Appellate Court did not have jurisdiction to consider her claim that the Juvenile Court Act's minimum mandatory sentence of five years' probation violated the equal protection clause.

The court rejected defendant's argument that it had jurisdiction to review her claim because it involved a constitutional attack on a statute which, if successful, would render the underlying judgment void. Although a void judgment may be attacked at any time, a judgment is void only where the court that entered the judgment lacked jurisdiction. Even if the Juvenile Court Act violated equal protection, the probation order was entered by a court of competent jurisdiction, and hence the order was merely voidable, not void.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

In re Omar M., 2012 IL App (1st) 100866 (No. 1-10-0866, 6/29/12)

To have standing to challenge the constitutionality of a statute, a person must have suffered or be in immediate danger of suffering a direct injury as a result of enforcement of the challenged statute. The purpose of standing is to ensure that courts decide actual, specific controversies and not abstract or moot issues. For a plaintiff to have standing, his claimed injury: (1) must be fairly traceable to respondent's actions; (2) must be substantially likely to be prevented or redressed by the grant of the requested relief; and (3) must consist of a distinct and palpable injury.

The minor had standing to challenge the constitutionality of the Extended Jurisdiction Juvenile Prosecutions (EJJ) statute on vagueness grounds. The claimed injury is directly traceable to the State's imposition of an adult sentence under the EJJ prosecution. The claimed injury would be redressed if the statute were found unconstitutional. The minor's injury is both distinct and palpable because if the statute is vague, he will live in fear that he may unknowingly revoke the stay of his adult sentence through his conduct. Therefore, the minor had standing to challenge the EJJ statute because he was in immediate danger of sustaining harm by enforcement of the allegedly unconstitutional provision.

(Respondent was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Aguilar, 408 Ill.App.3d 136, 944 N.E.2d 816 (1st Dist. 2011)

1. Under Illinois law, courts give effect to a clear expression of legislative intent concerning whether a statute is to be applied retroactively. Where there is no clear expression of legislative intent, procedural amendments are generally applied retroactively, while substantive amendments are applied prospectively.

Amendments to the definition of the offense of aggravated unlawful use of a weapon were not intended to apply retroactively to conduct which occurred before the effective date. Because the public act (P.A. 96-742) stated that it would be effective upon becoming a law, the court concluded that it contained an unambiguous statement of legislative intent that the new

provisions were to be applied prospectively.

The court acknowledged that where the legislature amends a statute shortly after a controversy concerning the meaning of the statute, it is presumed that the amendment was intended as a legislative interpretation of the original legislation. However, a subsequent amendment does not replace the plain language of the statute as the best evidence of the legislature's original intent. In addition, the amendment here went further than would have been necessary to correct any possible belief by the legislature that the courts had misinterpreted legislative intent.

2. Only the Illinois Supreme Court has authority to overrule its decisions. Thus, the Appellate Court lacked authority to reconsider Illinois Supreme Court precedent interpreting the Illinois state constitution, even where it seems that such precedent is no longer valid under U.S. Supreme Court case law.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

People v. Anderson, 402 Ill.App.3d 186, 931 N.E.2d 773 (3d Dist. 2010)

The trial court's order imposing an enhanced four-year mandatory supervised release term under 730 ILCS 5/5-8-1(d)(5), and imposing fines, was "voidable" rather than "void." A judgment is void only if entered by a court which lacks jurisdiction. Defendant challenged only the specific term of MSR and the amount of the fines, and did not challenge the authority of the court to impose such sentences. Because the sentencing order was clearly within the court's jurisdiction, the order was merely "voidable."

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Barghout, 2013 IL App (1st) 112373 (No. 1-11-2373, 12/20/13)

To determine whether a first-stage post-conviction petition states the gist of a constitutional claim, the Appellate Court must review the entire petition in light of the trial record. The court's review is not limited to those claims raised on appeal. Where the court on its own review of the record discovers a clear and obvious error not raised by appellate counsel, the court may properly request that the parties brief the issue.

Here, the court determined that defendant's post-conviction petition raised a meritorious claim that he rejected a plea bargain based on erroneous advice of his trial counsel. Since this claim had not been raised by appellate counsel, the court ordered the parties to brief the issue. The court rejected the State's argument that it had overstepped its authority by requesting briefing on this issue. After examining the Illinois Supreme Court's decisions in **Coleman**, 183 Ill.2d 366 (1998), **Edwards**, 197 Ill. 2d 239 (2001), and **Hodges**, 234 Ill. 2d 1 (2009) (all discussing the appropriate standards for reviewing first-stage dismissals), the Appellate Court concluded that nothing in those decisions limited review to those parts of the petition argued on appeal. Instead, those decisions allow the Appellate Court to address any issues it discovers during its own review of the record. A reviewing court has the authority to address unbriefed issues where a clear and obvious error exists in the lower court's proceedings.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Bernard, 2014 IL App (2d) 130924 (No. 2-13-0924, mod. op. 2/10/15)

Other than deciding whether it has jurisdiction, a reviewing court normally will not search the record for unargued and unbriefed reasons to reverse the trial court. Instead, courts normally only decide questions presented by the parties. But under Illinois Supreme Court Rule 366(a)(5), a reviewing court "may, in its discretion, and on such terms as it deems

just...make any other or further orders and grant any relief, including a remandment...that the case may require.”

Here, the trial court denied defendant’s motion to withdraw her guilty plea and defendant appealed. The Appellate Court remanded the case back to the trial court because of a Rule 604(d) violation. Although defendant filed a new motion to withdraw, the trial court again denied the defendant’s motion because the original motion had not been timely filed.

Defendant did not raise any issue about the trial court erroneously denying the post-remand motion based on reasons that would only apply to the original motion. The Appellate Court, however, addressed the issue on its own, stating that it had “no confidence in a decision that is so obviously based on a confused and incorrect understanding of the status of the case.” The case was remanded for a new hearing on the motion to withdraw.

People v. Blalock, 2012 IL App (4th) 110041 (No. 4-11-0041, 9/10/12)

1. Under Illinois Supreme Court Rule 12(b)(3), where a document is filed by mail or by a commercial delivery service, proof of service must be by an attorney’s certificate or by the affidavit of the non-attorney who deposited the document in the mail or delivered it to the commercial service. The affidavit is required to state the time and place of mailing, the complete address to which the documents were mailed, and the fact that the proper postage or delivery charge was prepaid.

2. The defendant, who was incarcerated, filed a *pro se* motion for reduction of sentence after he was sentenced on a probation revocation. The court concluded that the proof of service filed by the defendant was insufficient to comply with Rule 12(b)(3).

The circuit clerk’s office file-stamped defendant’s motion one day after it was due. However, the envelope in which the motion was mailed showed a postmark three days before the due date. Accompanying the petition was a single sheet of paper which contained: (1) a sworn statement that the allegations of the motion were true, (2) the notice of filing, and (3) the proof of service. The only notarization on this sheet was located at the top, directly under the sworn statement and above the notice of filing and proof of service. The notarization was dated one day before the postmark on the envelope.

The court rejected the claim that the notarization at the top of the page could be interpreted as applying to the proof of service. “[S]tatements in a writing not sworn to before an authorized person cannot be considered affidavits.”

The court also rejected the argument that because the documents were stapled together in the court file, they should be viewed as a single document that was mailed on the date of the postmark and placed in the prison mail system on that date or on the date of the notarization. The court stressed that in Rule 12(b)(3), the Supreme Court chose to require a certificate or an affidavit rather than rely on the date of the postmark. The Appellate Court lacks authority to excuse compliance with the rule.

Because the document did not show that the proof of service was notarized as required by Rule 12(b)(3), the motion for reduction of sentence was considered to have been filed as the date it was file-stamped by the clerk’s office. Because this date was one day after the due date, the motion was untimely.

3. However, the court concluded that the trial court was revested with jurisdiction despite the fact that the motion was untimely. Parties may reconstitute the trial judge with “jurisdiction” if: (1) the court has general jurisdiction over the matter and personal and subject-matter jurisdiction over the cause; (2) the parties actively participate without objection in proceedings directed at the prior judgment; and (3) the proceedings are inconsistent with the merits of that judgment. If a trial court is reconstituted with jurisdiction, a notice of appeal

timely filed within 30 days after the ruling on an untimely post-judgment motion allows the Appellate Court to hear an appeal.

The court noted precedent holding that the revestment document does not apply to post-plea motions. Here, however, the court concluded that the revestment doctrine applied because the motion to reduce sentence was filed after probation was revoked and a new sentence imposed. Although the original conviction was pursuant to a guilty plea, “defendant's motion for reduction of sentence is more akin to an appeal following a jury or bench trial . . . than a guilty plea.”

The court also concluded that the three requirements of the revestment doctrine were satisfied. The trial court had general, personal, and subject-matter jurisdiction of the case, the State actively participated without objection at the hearing on the untimely motion to reduce sentence, and those proceedings were inconsistent with the prior judgment because defendant was requesting reduction of his sentence. Because the trial court was revested with jurisdiction, the Appellate Court had jurisdiction to consider the appeal.

(Defendant was represented by Supervisor Arden Lang, Springfield.)

People v. Bozarth, 2015 IL App (5th) 130147 (No. 5-13-0147, 1/26/15)

The Illinois Constitution authorizes appeals in final judgements and permits the Supreme Court to provide for appeals of orders that are not final. Supreme Court Rule 604(b) provides that a defendant may appeal from an order of supervision and may seek review of the conditions of supervision, the finding of guilt, or both. Thus, the Appellate Court had jurisdiction to hear an appeal where after a stipulated bench trial defendant was sentenced to one year of court supervision.

(Defendant was represented by Assistant Defender Maggie Heim, Mt. Vernon.)

People v. Chirchirillo, 393 Ill.App.3d 916, 913 N.E.2d 635 (2d Dist. 2009)

The court rejected the State's argument that defendant could be convicted of unlawful possession of a weapon by a felon because she constructively possessed a weapon that was in the possession of the principal. The State failed to present such a theory at trial, and “cannot, after advancing an accountability theory at trial . . ., advance a different theory of guilt on appeal.” (See also **ACCOUNTABILITY**, §1-1). (Defendant was represented by Panel Attorney Lawrence Fischer, Cary.)

People v. Coleman, 2013 IL App (1st) 130030 (No. 1-13-0030, 12/18/13)

The State forfeited an alternative argument which it made in the Supreme Court where it failed to raise the argument in the trial court and expressly stated in that court that it was taking a more limited position.

People v. Douglas, 2014 IL App (4th) 120617 (No. 4-12-0617, 7/2/14)

1. On appeal from the dismissal of his post-conviction petition, defendant argued that the trial court improperly sent a letter to the Department of Corrections stating that defendant's petition was frivolous and patently without merit. The Appellate Court declined to rule on this issue, noting that “defendant did not raise, nor could he have raised” any argument in his post-conviction petition regarding the trial court's letter.

Relying on **People v. Jones**, 213 Ill. 2d 498 (2004), which held that an issue not raised in a post-conviction petition may not be raised for the first time on appeal from the dismissal of the petition, the Appellate Court held that it would not rule on the propriety of the trial court's letter. The Appellate Court also noted that the record did not establish that the

Department of Corrections took any action against defendant because of the letter and thus the issue was potentially moot.

2. The Appellate Court, however, did address defendant's argument that he was improperly sentenced to 10 years' imprisonment as a Class X offender, even though he did not raise this issue in his post-conviction petition. **Jones** does not apply to allegations that a defendant's sentence is void. If defendant was ineligible to be sentenced as a Class X offender, the trial court had no authority to impose the 10-year Class X sentence, and hence his sentence would be void and capable of being challenged for the first time on appeal from the dismissal of his post-conviction petition.

(Defendant was represented by Deputy Defender Jackie Bullard, Springfield.)

People v. Dunmore, 2013 IL App (1st) 121170 (No. 1-12-1170, 12/24/13)

Defendant entered a negotiated guilty plea to an unlawful use of a weapon charge, and was sentenced to 18 months' probation and ordered to pay fines and fees. After his probation was revoked for committing another offense, he was sentenced to two years in prison. Defendant had completed his sentence by the time of this appeal, and challenged only the revocation of probation and the assessment of fees and fines.

1. While the appeal was pending, the Supreme Court issued **People v. Aguilar**, 2013 IL 112116, which held that the statute to which defendant pleaded guilty (5/24-1.6(a)(1), (a)(3)(A)) was unconstitutional on its face. The court rejected defendant's request that it leave the conviction intact and limit its consideration to the revocation of probation and payment of fees and fines.

Once **Aguilar** held that the section of the Criminal Code on which the plea rested was facially unconstitutional, the statute was rendered void *ab initio*. In addition, judicial decisions declaring a statute unconstitutional apply to cases pending on direct review. Because defendant's conviction was void and courts have an independent duty to vacate void orders, **Aguilar** required that the void conviction be vacated once it came before the court.

2. The State sought a remand to reinstate charges which had been dismissed as part of the plea agreement, and asked the court to review the constitutionality of the unlawful use of weapon and aggravated unlawful use of weapon charges which it might seek to reinstate. The court declined to consider whether **Aguilar** would render unconstitutional charges which had not yet been reinstated. Reviewing courts should not consider abstract questions or render advisory opinions.

(Defendant was represented by Assistant Defender Jean Park, Chicago.)

People v. Gibson, 403 Ill.App.3d 942, 934 N.E.2d 611 (2d Dist. 2010)

1. Ordinarily, the trial court loses jurisdiction over a matter 30 days after final judgment is entered, unless a timely post-judgment motion is filed. Under the revestment doctrine, however, parties may re-vest a court which has general jurisdiction with both personal and subject matter jurisdiction after the 30-day period has run.

The revestment doctrine applies when the parties actively participate, without objection, in proceedings that are inconsistent with the merits of the prior judgment. Conduct is inconsistent with a prior judgment if such conduct can be reasonably construed as showing that a party does not regard a prior order as final and binding.

If jurisdiction is re-vested in the trial court, a timely notice of appeal may be filed within 30 days after a ruling is issued on an untimely post-judgment motion.

2. The parties re-vested the trial court with jurisdiction where the State actively participated, without objection, in a hearing on defendant's untimely post-judgment motion.

Both defense counsel and the trial court stated that the motion was untimely, but the State's Attorney actively participated in the proceedings without objecting and argued that the motion should be denied on its merits.

(Defendant was represented by Assistant Defender Vicki Kouros, Elgin.)

People v. Gonzalez, 407 Ill.App.3d 1026, 944 N.E.2d 834 (2d Dist. 2011)

On remand, the trial court lacks authority to act beyond the scope of the mandate. If specific instructions are given by the reviewing court, the lower court must comply with those instructions. If no specific instructions were given, the lower court must examine the opinion or order and proceed consistently.

Where the cause was remanded for an evidentiary hearing on the defendant's post-conviction petition, which contained a single allegation of constitutional error, the trial judge did not exceed the scope of the mandate by allowing the defendant to amend the petition to raise a new claim. The mandate directed the trial court to consider whether newly discovered evidence was of such conclusive character as to probably change the result of a retrial, but did not otherwise dictate the scope of the hearing.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Guillen, 2014 IL App (2d) 131216 (No. 2-13-1216, 11/25/14)

The State appealed the trial court's dismissal of charges against defendant based on double jeopardy. Defendant's appellate attorney was allowed to withdraw because he had not been retained for appeal and defendant filed no appellate brief responding to the State's arguments. The Appellate Court agreed that it could nonetheless consider the merits of the appeal, but split three ways on the rationale for doing so with no controlling opinion.

In **First Capitol Mortgage Corp. v. Talandis Construction Corp.**, 63 Ill. 2d 128 (1976), the Supreme Court set out three options available to the reviewing court when an appellee does not file a brief: (1) the court may, if justice requires, serve as an advocate for the appellee and search the record for reasons to affirm the judgment being appealed; (2) the court may decide the case on the merits if the record is simple and the issues easily decided even without an appellee's brief; or (3) the court may reverse the judgment below if the appellant's brief demonstrates *prima facie* reversible error and the record supports the appellant's contentions.

1. Justice Schostok delivered the judgment of the court reversing the trial court, and writing for herself alone selected the second **Talandis** option. She contended that the record was simple since there were no disputed factual issues and, although she admitted that principled persons may disagree with her decision (as shown by the dissenting opinion), the legal issue was simple enough for the court to decide the case without the aid of an appellee's brief. Accordingly, Justice Schostok determined based on the appellant's brief alone that the trial court had improperly dismissed the charges on double jeopardy grounds.

2. Justice Zenoff agreed with the judgment reversing the trial court, but disagreed with Justice Schostok's use of the second **Talandis** option. Although the record was simple, the double jeopardy issue was not easily decided, as shown by the dissenting opinion, the length and complexity of Justice Schostok's analysis, and the fact that this was an issue of first impression in Illinois.

Justice Zenoff also disagreed with Justice Hudson, who in dissent selected the first option from **Talandis**. That option is available only if justice so requires, which was not true here. The court allowed defendant's private counsel to withdraw and defendant did not retain new counsel or appear *pro se*. Justice thus did not compel the court to advocate on defendant's

behalf.

Instead, Justice Zenoff selected the third **Talandis** option. That option allows the court to reverse the trial court if the appellant's brief shows *prima facie* reversible error supported by the record. *Prima facie* means "at first sight" or "on the face of it." Here, the State established what appeared to be error "at first sight," and thus Justice Zenoff would reverse on that basis.

3. Justice Hudson dissented from the judgment reversing the trial court. He agreed with Justice Zenoff that the issue was not simple and thus the second **Talandis** option should not apply. Instead, he selected the first option and acted as an advocate for defendant. He disagreed with Justice Zenoff's contention that the first option did not apply because defendant did not retain new counsel or appear *pro se*. Although this might show a lack of diligence, the record was unclear as to why defendant failed to do this, and it would be unfair to attribute dispositive weight to this single factor.

The more important factor was the nature of the right at issue and here there was a violation of a fundamental constitutional protection. Thus the court had an obligation to serve as an advocate for defendant and, having done so, Justice Hudson would have found that the trial court properly dismissed the charges on double jeopardy grounds.

People v. Hall, 2014 IL App (1st) 122868 (No. 1-12-2868, 10/20/14)

Defendant was convicted of violating the Sex Offender Registration Act (730 ILCS 150/6) because he failed to register after having been convicted of aggravated criminal sexual assault and of a prior failure to register. As charged, the offense was a Class 2 felony. The trial court imposed a Class X sentence based on two prior convictions - the same aggravated criminal sexual assault conviction that was an element of the offense, and a prior DUI conviction.

The court concluded that the legislature did not intend for a single conviction to be used both as an element of the offense of failing to register as a sex offender and as a reason to enhance the sentence. Thus, the Class X sentence was void and could be challenged for the first time on appeal from the denial of a post-conviction petition.

The court rejected the argument that the issue was moot because defendant had completed the term of imprisonment. The court noted that defendant was serving a three-year-period of mandatory supervised release on the Class X conviction, and that if he was resentenced on a Class 2 felony he would be subject to only a two-year MSR term. Thus, relief could be granted in the form of a shorter MSR term.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Hammond, Gaither, & Donahue, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2009) (Nos. 4-08-0651, 0652 & 4-09-0214, 12/21/09)

The court declined to consider the State's argument concerning the separation of powers doctrine, because the argument differed from the argument raised in the trial court and in the State's brief. The State raised its assertion for the first time in the middle of the "Argument" section of the State's brief in the Supreme Court, and "we do not want to run the risk that defendants would be confused or blind-sided by a new theory that the State slipped into the body of its argument." (See also **PROBATION**, §40-5(a)).

(Defendants were represented by Assistant Defender Catherine Hart, Springfield.)

People v. Hansen, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-08-1226, 5/27/11)

Under Supreme Court Rule 272, if a party is required to draft an order to reflect the

judgment reached by the court, the order is effective when the signed judgment is filed. Where no signed judgment is required, the judge or the clerk should make a notation of the judgment and enter the judgment of record promptly. The judgment becomes effective when it is entered.

Where defendant's motion for reconsideration of the denial post-conviction relief was scheduled to be heard on November 10, but on November 5 the trial court entered a written order denying the motion, the order became effective on November 10, when it was announced to the parties. To hold otherwise would create an untenable result by possibly forcing a defendant to lose his right to appeal even though he was unaware of the trial court's order.

Because the order denying reconsideration took effect November 10, defendant had 30 days from that date to file a notice of appeal.

(Defendant was represented by Assistant Defender Larry Wells, Mt. Vernon.)

People v. Henderson, 2011 IL App (1st) 090923 (No. 1-09-0923, 11/17/11)

1. Courts generally will not review moot issues. The purpose of this rule is to avoid consideration of cases where the parties no longer have a personal stake in the case's outcome. A case can become moot due to a change in circumstances while an appeal is pending.

There are three exceptions to the mootness doctrine: (1) the public-interest exception; (2) the capable-of-repetition-yet-evading-review exception; and the collateral-consequences exception. The public-interest exception permits a court to consider an otherwise moot issue when: (1) the question presented is of a public nature; (2) an authoritative determination is necessary for future guidance of public officers; and (3) a likelihood exists that the question will recur.

The defendant's appeal from the dismissal of his post-conviction petition became moot due to defendant's completion of service of his sentence, including his MSR term. The question of whether the trial court can summarily dismiss a *pro se* post-conviction petition due to an unnotarized verification affidavit nonetheless could be reached under the public-interest exception.

The question of whether the trial court can summarily dismiss a petition due to an unnotarized verification affidavit is a question of a public nature that affects a large number of criminal defendants who file petitions every year. An authoritative determination is necessary for the future guidance of trial court judges, who are public officers. A likelihood exists that the issue will arise in the future in light of the sheer volume of petitions being filed and "the fact that this is at least the second case this year in which the State has argued that this is an appropriate basis for first-stage dismissal."

2. A void judgment may be attacked directly or collaterally in any court at any time. Although a reviewing court is not vested with authority to consider the merits of a case merely because the dispute involves an order that is or is alleged to be void, the lack of standing to file a post-conviction petition is not a jurisdictional defect that deprives the court of the authority to consider the merits of an argument that a judgment is void.

3. Generally, it is appellant's burden to properly complete the record on appeal. Any doubts arising from the incompleteness of the record will be construed against the appellant and in favor of the judgment rendered in the lower court. This rule is relaxed where the defendant can prove that the record is incomplete due to no fault of his own, as well as demonstrate that there is a colorable need for the missing portion of the record in order to have appellate review. If defendant can establish both prongs, the State then must show that there are other means to afford adequate review.

The indictment was not included in the record on appeal and both parties' efforts to

locate a copy of the indictment were unsuccessful. The indictment was relevant to defendant's argument that his criminal conviction was void as it did not allege an offense that was subject to transfer from juvenile to criminal court. However, the court concluded that defendant had not established a colorable need for the indictment as his claim that he was not charged with a transferable offense was based on speculation.

Defendant conceded that he did not know the exact language used in the indictment. He conceded that he may have committed a transferable offense. "Thus it appears from defendant's argument that it is equally probable that an error did or did not occur but he asks us to assume the former." Defendant's decision to waive reading of the indictment, and not to challenge his transfer to criminal court, even after it was questioned why defendant was before the criminal court, suggests that counsel's review of the indictment revealed no defects. "We will not equate defendant's fishing expedition with a colorable need for the indictment."

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Hill, 2014 IL App (3d) 120472 (Nos. 3-12-0472 & 3-12-0473, 3/13/14)

1. Defendant argued that the trial court improperly required him to pay a \$200 DNA analysis fee. The Appellate Court observed that defendant did not preserve the error in the trial court. Typically defendants avoid the consequences of forfeiture by arguing that the sentence is void, but defendant did not argue voidness in this case. Nonetheless, in the interest of maintaining a uniform body of law, the Court *sua sponte* considered whether the imposition of the DNA fee was void.

2. In arguing that the DNA fee was improperly imposed, defendant relied on an information sheet provided by the ISP Division of Forensic Services showing that defendant submitted a blood sample for analysis on July 11, 1995. The Court held that although this document was not presented to the trial court, it would take judicial notice of it as a public record. The Court therefore recognized that defendant submitted a DNA sample in 1995.

3. The Court refused to consider information from the website "judici.com," in deciding whether defendant was improperly assessed two DNA fees. Instead, the Court relied exclusively on the clerk's "payment status information," included in the common law record. The Court noted that printouts from "judici.com," were appended to the brief, but were not part of the record on appeal. The Court cautioned the parties against attempting to supplement the record with information from the internet without first obtaining leave of the Court.

(Defendant was represented by Assistant Defender Gabrielle Green, Chicago.)

People v. Hobson, 2014 IL App (1st) 110585 (No. 1-11-0585, 3/12/14)

The Appellate Court rejected the State's argument that in an appeal from the second stage dismissal of a post-conviction petition, the court "stepped outside of its proper role as neutral arbiter" by asking the parties to brief an issue which had been raised in the post-conviction petition but not included in the original brief on appeal. In reviewing an order dismissing a post-conviction petition at the second stage, the Appellate Court is required to review the entire petition and all supporting documents to determine whether, in light of the trial record, the petitioner has made a substantial showing of a constitutional violation. Because a reviewing court has authority to address unbriefed issues *sua sponte*, it necessarily has authority to request supplemental briefs instead. Therefore, the court did not act improperly by asking the parties to brief an issue that was presented by the post-conviction petition.

In a concurring opinion, Justice Hyman stated that while a reviewing court should act

with restraint in using its discretionary power to reach new issues, in criminal cases the desire for restraint must be informed with regard for the defendant's right to a fair trial. Justice Hyman also noted that the defendant presented the issue to the trial court, the trial court ruled on the issue, the issue was preserved for appeal, and both parties received notice of the court's interest in the issue and could file supplemental briefs. Thus, the procedure assured a fair and just review and fulfilled the fundamental demands of procedural due process.

In a specially concurring opinion, Justice Mason disputed the court's decision to ask for briefing on an additional issue and stated that "competent counsel are in the best position to decide which of several issues raised in the trial court should be pursued on appeal.

(Defendant was represented by Assistant Defender Autumn Fincher, Chicago.)

People v. Jake, 2011 IL App (4th) 090779 (No. 4-09-0779, 8/15/11)

In a criminal appeal, the Appellate Court lacks jurisdiction to consider issues arising from the circuit clerk's imposition of a late fee and a collection fee for unpaid fines and fees. The court concluded that the fees, which are authorized by statute, "are in the nature of a separate civil penalty which must be challenged by a cause of action separate from the criminal case."

The court also noted that the fees were imposed several months after the notice of appeal was filed. A reviewing court has jurisdiction to consider only the judgments specified in the notice of appeal.

The court also stated that if the defendant chooses to contest the civil penalties, he will be required to either act *pro se* or hire an attorney rather than relying on court-appointed counsel.

(Defendant was represented by Assistant Defender Amber Gray, Springfield.)

People v. Liekis, 2010 IL App (2d) 100774 (No. 2-10-0774, 7/31/12)

1. Defendant's filing of a motion to modify the conditions of conditional discharge did not revest jurisdiction in the trial court. The motion had no effect on defendant's previously-filed timely notice of appeal from his conviction. A motion to modify the conditions of conditional discharge is not a motion to reconsider the sentence. The trial court retains jurisdiction to modify the conditions of conditional discharge. 730 ILCS 5/5-6-4(f).

2. The doctrine of invited error or acquiescence is a form of procedural default or estoppel. It provides that a party may not request the court to proceed in one manner and then argue on appeal that the requested action was error. The rationale of the doctrine is that it would be unfair to grant relief to a party based on error that the party introduced into the proceedings.

The State was not barred by the doctrine of invited error from arguing on appeal that the defense had not met its burden at the hearing on a motion to suppress. The defense and not the State argued that the defense had met its burden and that the burden shifted to the State. The State disagreed that the burden had shifted, and merely acquiesced to the court's judgment as to whether the defense had met its burden.

3. The appellant bears the burden of preserving and presenting an adequate record of the asserted error. Any doubts arising from the inadequacy of the record must be resolved against the appellant.

Where defendant claims that she did not waive the right to trial by jury in open court, she must present a record that sufficiently covers all proceedings that could have involved the waiver. Without an adequate record, the reviewing court must assume that the record indications of a jury waiver are indeed based on a valid waiver.

Defendant presented an incomplete record on the issue of jury waiver. The half sheet indicated that on the day that a stipulated bench trial was conducted, “jury trial [was] waived.” The agreed statement of facts indicated that defense counsel moved for a stipulated bench trial and that a stipulated bench trial was conducted immediately following the court’s denial of defendant’s motion to reconsider. No report of proceedings for that date was included in the record. In the absence of a report of proceedings or acceptable substitute, the court assumed that the record indications of a jury waiver were based on a valid waiver.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

People v. Love, 2013 IL App (2d) 120600 (No. 2-12-0600, 12/19/13)

Defendant filed a *pro se* post-conviction petition while his direct appeal was pending. That petition was summarily dismissed on the same day his direct appeal was decided. The ground for the dismissal was that the defendant failed to raise a constitutional issue and argued only that a statutory provision had been violated.

Defendant did not appeal the summary dismissal, but subsequently filed a second post-conviction petition and an amended second post-conviction petition. The trial court treated the amended petition as a successive post-conviction petition and denied leave to file it.

On appeal, defendant argued that because the petition filed during his direct appeal did not raise a constitutional issue, it should have been characterized as a §2-1401 petition even though it was labeled a post-conviction petition. Thus, defendant contended that his second filing was his first post-conviction petition and that leave to file was not required.

The court concluded that it lacked jurisdiction to address issues concerning defendant’s first petition, including whether the trial court should have characterized it as a §2-1401 motion instead of a post-conviction petition. To preserve review of a judgement entirely disposing of a post-conviction proceeding, the party seeking review must file a notice of appeal within 30 days of the entry of judgement or an order disposing of a timely filed motion attacking the judgement. The trial court treated the first filing as a post-conviction petition, and entered a summary dismissal. Because that dismissal was a final judgement resolving all of the issues that were raised in the petition, defendant had 30 days to file either a notice of appeal or a motion attacking the judgement. By failing to act, defendant deprived the Appellate Court of jurisdiction to consider any issues arising from the initial petition, including whether it should have been treated as a post-conviction or §2-1401 proceeding.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

People v. McNeal, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2010) (No. 1-08-2264, 9/30/10), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32

A reviewing court should not search the record for unargued and unbriefed reasons to reverse the judgment of a trial court. A court may address an unbriefed issue when a clear and obvious error exists in the trial court proceedings and addressing the error is necessary to provide for a just result and for the maintenance of a sound and uniform body of precedent.

Following that rationale, the dissent (Gordon, R., J.) would reverse defendant’s aggravated criminal sexual assault conviction based on evidence that he forced complainant to insert her finger in her vagina, where that conduct does not meet the statutory definition of penetration. See also **SEX OFFENSES** §46-2(a).

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Medrano, 2014 IL App (1st) 102440 (No. 1-10-2440, 4/16/14)

A void sentence can be corrected at any time and is not subject to waiver or forfeiture. But the issue of voidness must be raised in a proceeding that is properly pending before a court that has jurisdiction. If the court lacks jurisdiction, it cannot confer any relief, even from

a void judgment.

Here, defendant argued for the first time on appeal from the second-stage dismissal of his post-conviction petition that the sentence imposed on his guilty plea was void, and therefore he should be allowed to withdraw his guilty plea. The State, relying on **People v. Flowers**, 208 Ill. 2d 291 (2003), argued that since defendant filed his post-conviction petition well beyond the three-year statute of limitations period, the voidness issue was procedurally barred.

In **Flowers**, defendant filed an untimely Rule 604(d) motion arguing that her sentence was void. The trial court denied the motion as being untimely, but the Appellate Court reversed, holding that the timeliness requirements of Rule 604(d) were not jurisdictional and could be excused when considering a void sentence. The Illinois Supreme Court reversed the Appellate Court, holding that the only matter properly before the Appellate Court was the trial court's lack of jurisdiction over the untimely 604(d) motion. Because strict compliance with Rule 604(d) is a condition precedent to an appeal on the merits, the Appellate Court had no authority to vacate the void sentence.

The court held that **Flowers** did not apply to the present case. Unlike Rule 604(d), which divests the trial court of jurisdiction after 30 days, the time limits on filing a post-conviction petition are not jurisdictional. Instead, they act as a statute of limitations that the State can waive or forfeit. The trial court thus had jurisdiction to address the issues raised in defendant's petition, and since defendant filed a timely appeal, the Appellate Court had jurisdiction to address the trial court's judgment.

Since the Appellate Court had jurisdiction to address the lower court's judgment, it could address the issue of whether the sentence was void, even though the issue was not raised below, since void judgments "can be challenged on collateral review for the first time on appeal."

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

People v. Molidor, 2012 IL App (2d) 110006 (No. 2-11-0006, 5/25/12)

A motion for return of bond is governed not by Supreme Court Rule 604(d), but by 725 ILCS 5/110-7(f), which authorizes the return of 90% of the bond deposit when the conditions of bond have been performed and the defendant has been discharged from all obligations. Because §110-7(f) does not establish a time limitation for moving for return of the bond, the Appellate Court did not lack jurisdiction to consider an appeal from denial of a motion to return bond although the defendant failed to file his motion within 30 days of sentencing.

(Defendant was represented by Assistant Deputy Defender Bruce Kirkham, Elgin.)

People v. Neely, 2013 IL App (1st) 120043 (No. 1-12-0043, 11/12/13)

Defendant argued that his conviction for aggravated unlawful use of a weapon violated the Second Amendment and must be vacated. The court concluded that the challenge was not properly before the court because the AUUW conviction had been merged with a conviction for unlawful use of a weapon, a sentence had been imposed only on the latter conviction, and that conviction and sentence had been affirmed. Because there is no final judgment in a criminal case until sentence is imposed and no sentence was imposed for AUUW, the conviction could not be reviewed.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Newlin, 2014 IL App (5th) 120518 (No. 5-12-0518, 9/23/14)

On defendant's direct appeal challenging the sentence for his first degree murder

conviction, the Appellate Court concluded that it lacked jurisdiction to consider the State's attempt to raise the trial court's failure to impose mandatory fines. First, the court noted that the record failed to support the argument that mandatory fines had not been imposed, rejecting the State's attempt to use a printout of the circuit clerk's online records to show what assessments were allegedly made. Second, the court stated that the failure to impose mandatory fines is not a matter which can be appealed by the State under Supreme Court Rule 604(a).

The court concluded:

What the State is essentially trying to do . . . is to piggyback an appeal on defendant's appeal. We can find no authority for such practice and will not allow the State to raise the issue of fines in such a manner.

(Defendant was represented by Assistant Defender Duane Schuster, Springfield.)

People v. Peterson, 397 Ill.App.3d 1048, 923 N.E.2d 890 (3d Dist. 2010)

The defendant lacked authority to cross-appeal from the State's interlocutory appeal under Supreme Court Rule 604(d). Rule 604 provides only limited authority to appeal interlocutory rulings, and none of the defendant's issues fell within the limitations of the rule. (See also **DISCOVERY**, §15-1).

People v. Ramirez, 2015 IL App (1st) 130022 (No. 1-13-0022, modified upon denial of rehearing 5/27/15)

Defendant argued on appeal that the trial court considered improper factors at sentencing. Defendant conceded that the issue was forfeited, but argued in a single paragraph that it should be considered under the plain-error rule "because consideration of an improper sentencing factor is plain error." Defendant cited **People v. James**, 255 Ill. App. 3d 516 (1st Dist. 1993) for the proposition that the consideration of improper factors at sentencing is plain error.

The Appellate Court held that defendant waived his plain error argument on appeal by failing to "expressly argue, much less develop the argument that either prong of the doctrine is satisfied." The court also noted that the holding of **James**, that every sentencing error involving the consideration of improper factors is plain error, would swallow the rule of forfeiture. The Court thus declined to conduct a plain error analysis and affirmed defendant's sentence.

(Defendant was represented by Assistant Defender Allison Shah, Chicago.)

People v. Salcedo, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-3148, 6/9/11)

1. Unless a timely post-judgment motion is filed, the trial court loses jurisdiction 30 days after final judgment is entered. In a criminal case, the sentence is the final judgment. Thus, the trial court retains jurisdiction only if the defendant files a motion to reconsider the sentence or a notice of appeal within 30 days of sentencing.

2. Without deciding whether the trial court has authority to grant an extension of time in which to file a post-sentencing motion, the court found that the motion which the judge granted was merely a continuance of the hearing on such a motion, if one was timely filed. The court noted that defense counsel's motion stated that because he was involved in another trial, he would be unavailable for "any evidentiary trial or hearing."

3. The court concluded, however, that the parties revested the trial court with jurisdiction to consider an untimely post-sentencing motion. Under the revestment doctrine,

parties revest the trial court with personal and subject matter jurisdiction by actively participating in proceedings which are inconsistent with the merits of a prior judgment. Conduct is deemed inconsistent with a prior judgment where it could be construed as an indication that the parties do not view the prior judgment as final and binding. Active participation, rather than mere consent, is required to revest jurisdiction.

If jurisdiction is revested in the trial court, the filing of a notice of appeal within 30 days after the ruling on an untimely post-judgment motion vests the Appellate Court with jurisdiction.

Here, the State revested the trial court with jurisdiction when it affirmatively argued that defendant's untimely motion to reconsider the sentence should be denied on its merits. "By participating rather than objecting to the hearing, the State essentially acknowledged that the previous sentencing judgment should be revisited." The court rejected the argument that jurisdiction is revested only where both parties specifically seek to set aside the judgment; the revestment doctrine applies where a party challenges a prior judgment and the opposing party acts in a manner that is inconsistent with the final and binding nature of that judgment.

Defendant's convictions for first degree murder and aggravated battery with a firearm were affirmed.

(Defendant was represented by Assistant Defender Michael Soukup, Chicago.)

People v. Thomas, 2014 IL App (2d) 121001 (No. 2-12-1001, 9/26/14)

1. A claim that has not been raised in a *pro se* post-conviction petition may not be raised for the first time on appeal from the first-stage dismissal of that petition. **People v. Jones**, 213 Ill. 2d 498 (2004). In determining whether an issue has been forfeited for not being raised below, courts should afford the petition a liberal construction allowing borderline cases to proceed. A *pro se* petitioner is unlikely to be aware of the precise legal basis for his claim, and hence need only allege enough facts to make an arguable claim. The pleading must, however, bear some relationship to the issue raised on appeal.

2. At trial, the court precluded evidence that another man, N.H., confessed to the police and to a jail pastor that he had committed the offense. The trial court ruled that the confession to the pastor was barred by clergy-penitent privilege. On direct appeal, defendant's counsel argued that the court erred in precluding evidence of N.H.'s confession to the police, but raised no issue about N.H.'s confession to the jail pastor. The court rejected defendant's argument and affirmed his conviction.

3. In his *pro se* petition, defendant argued that his direct appeal counsel was ineffective for failing to raise an issue about trial counsel's failure to investigate and present facts showing that N.H. confessed to the murder. In support of this claim, defendant referenced various facts about N.H.'s confessions, including his confession to the pastor. Defendant also claimed that trial counsel failed to take any steps to corroborate N.H.'s confession to the police.

4. On appeal from the first-stage dismissal of his petition, defendant argued that his direct appeal counsel was ineffective for failing to raise an issue that the trial court erred in precluding N.H.'s confession to the jail pastor based on clergy-penitent privilege. The State argued that defendant forfeited this claim by failing to include it in his *pro se* petition. According to the State, although defendant argued appellate counsel's ineffectiveness both below and on appeal, defendant's post-conviction petition focused on trial counsel's failure to investigate and present facts supporting the admission of N.H.'s confession to the police, while his claim on appeal focused on the trial court's error in precluding evidence of N.H.'s confession to the pastor.

The Appellate Court rejected the State's forfeiture argument. The court pointed to

language in **People v. Hodges**, 234 Ill. 2d 1 (2009) and **People v. Edwards**, 197 Ill. 2d 239 (2001), stating that a *pro se* petition should be liberally construed and need not present a completely pled or fully stated claim since a *pro se* litigant may be unaware of the legal basis for his claim. Here, defendant's petition and his appellate argument both alleged ineffectiveness based on omissions related to the same underlying issue of the admissibility of N.H.'s confession. Under the liberal standards appropriate to *pro se* petitions, the two claims are sufficiently related, and hence defendant did not forfeit his appellate argument.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Vinokur, 2011 IL App (1st) 090798 (No. 1-09-0798, 8/24/11)

A void order may be attacked at any time, directly or collaterally, but the issue of voidness must be raised in the context of a proceeding that is properly pending in the courts.

Defendant's post-conviction petition was not properly before the trial court because he lacked standing to file the petition. As the dismissal of the petition was proper, he could not challenge his sentence as void on appeal from the dismissal of the petition. The Appellate Court only had the authority to review the correctness of the ruling that defendant lacked standing.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

People v. Wallace, 405 Ill.App.3d 984, 938 N.E.2d 573 (2d Dist. 2010)

Dismissal of a 2-1401 petition for relief from judgment due to defendant's failure to serve the petition on the State was a final and appealable order. The finality of a judgment of dismissal is dependent on whether the dismissal prejudices the filer. Because the limitations period for the filing of a 2-1401 petition expired two days after the court dismissed the petition, and before the court heard defendant's motion for reconsideration, defendant was prejudiced by the dismissal such that the dismissal was a final and appealable order.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Walton, 2013 IL App (3d) 110630 (No. 3-11-0630, 5/29/13)

Under Supreme Court Rule 615(b)(3), an Appellate Court may enter judgment of conviction for any uncharged offense that: (1) is a lesser-included offense of the charged offense; and (2) has been proved beyond a reasonable doubt.

The charging-instrument approach governs whether a charging instrument has properly charged an uncharged offense. Under this approach, an uncharged offense is considered a lesser-included offense of a charged offense if every element of the uncharged offense is contained in the charging instrument or if any element not listed in the charging instrument can be reasonably inferred from the charging instrument's allegations.

Under the charging-instrument approach, theft under subsection (a)(1) of the theft statute (720 ILCS 5/16-1(a)(1)) is a lesser included of theft under subsection (a)(4) (720 ILCS 5/16-1(a)(4)). Defendant was charged with a violation of subsection (a)(4), which requires that: (1) she obtained control over stolen property; and (2) she either knew that the property was stolen or reasonably should have known that it was stolen. Subsection (a)(1) requires that: (1) defendant obtained or exerted control over property of the owner; and (2) the control was unauthorized. Charging that defendant obtained control over stolen property is included within the element of (a)(1) that defendant obtain or exert control over the property. It can be reasonably inferred from the allegation that defendant obtained the property knowing that it was stolen that the control obtained or exerted by defendant was unauthorized.

Because the State proved that defendant committed all of the elements of the lesser-

included offense of subsection (a)(1), the Appellate Court reduced defendant's felony theft conviction under subsection (a)(4) to a felony conviction under subsection (a)(1).

(Defendant was represented by Assistant Deputy Defender Larry Wells, Mt. Vernon.)

People v. Ware, 2014 IL App (1st) 120485 (No. 1-12-0485, 3/14/14)

A notice of appeal confers jurisdiction on a reviewing court to consider only the judgments or parts thereof specified in the notice of appeal. Here, the Appellate Court found that because the notice of appeal was limited to defendant's current conviction for armed robbery, the Court did not have jurisdiction to determine whether defendant's previous convictions for aggravated unlawful use of a weapon (AUUW), introduced as aggravation at sentencing, were unconstitutional under **People v. Aguilar**, 2013 IL 112116.

Although the Illinois Supreme Court found that the Class 4 form of AUUW was void in **Aguilar**, that fact alone did not give the Appellate Court jurisdiction over defendant's prior convictions. The Appellate Court is not vested with authority to consider the merits of a case simply because it involves a void judgment. If defendant wants to challenge his prior convictions he must file the appropriate pleadings.

Additionally, since **Aguilar** implied that the Class 2 form of AUUW remains in effect, it is not necessarily true that defendant's prior AUUW convictions are void. The Court rejected defendant's request for resentencing.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

People v. Wynn, 2013 IL App (2d) 120575 (No. 2-12-0575, 12/26/13)

A criminal defendant for whom counsel has been appointed may be ordered to pay a reasonable sum to reimburse the county or State for the cost of appointed counsel. 725 ILCS 5/113-3.1(a). Before ordering reimbursement, the trial court must conduct a hearing concerning the defendant's financial resources and ability to pay.

Where defendant failed to appeal when he was placed on probation and ordered to pay a public defender fee, the Appellate Court lacked jurisdiction to review the public defender fee when defendant appealed after his probation was revoked. A defective order requiring a public defender fee is voidable rather than void, and may be challenged only if the defendant files a timely notice of appeal from the order imposing the fee.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

[Top](#)

§2-6(b)

Mootness

Cordrey v. Illinois Prisoner Review Board, 2014 IL 117155 (No. 117155, 11/20/14)

Defendant filed a *mandamus* complaint alleging that due process and equal protection were violated because due to his indigency, he was denied release on MSR after he was unable to find a suitable place to live. The court concluded that the public interest exception to the mootness doctrine applied. Thus, the case was not moot although defendant had completed his MSR term by the time the appeal was decided.

The public interest exception to the mootness doctrine applies where: (1) a question is of a substantial public nature; (2) there is a need for an authoritative decision to provide future guidance; and (3) the situation is likely to recur. Because every convicted felon who is not serving a natural life term is subject to MSR, and because the practice of violating inmates

who do not have an appropriate host site has been the subject of extensive litigation, the public interest exception was satisfied.

In re Commitment of Hernandez, 239 Ill.2d 195, 940 N.E.2d 1082 (2010)

The respondent was adjudicated sexually dangerous in 2004. In 2007, the trial court granted conditional release and ordered the Department of Human Services to submit a conditional release plan. The State filed a notice of appeal after the trial court granted conditional release but before the trial court approved the conditional release plan.

The Appellate Court found that the notice of appeal was untimely because it was filed before the judgement was final. The State appealed. The Supreme Court found that the issue was moot because while the cause was on appeal, the trial court had revoked conditional release.

1. An appeal is moot when intervening events make it impossible for a reviewing court to grant effective relief. Because the State had already received the relief it sought - the return of the respondent to the custody of DHS - any opinion which the court might enter would be purely advisory. Thus, the issue was moot.

2. The public interest exception to the mootness doctrine allows a reviewing court to consider a moot issue where there is a clear showing that the question is of a substantial public nature, an authoritative determination is needed to guide lower courts and the bar, and the issue is likely to recur. In determining whether an authoritative determination is needed, the court examines whether the law is in disarray or there is conflicting precedent.

If any of the three factors are absent, the public interest exception is inapplicable. The court concluded that the State could not establish the second factor – that an authoritative determination was required - because the Appellate Court’s holding was based on well-settled law concerning the finality of judgements, there was no conflicting precedent, and the State could not direct the court to any Illinois case which had adopted the rule it sought in this case. Furthermore, there was *no* precedent in Illinois on the narrow issue of the timeliness of the notice of appeal in a sexually dangerous person case; instead of issuing an opinion as a matter of first impression, the Appellate Court should have dismissed the appeal as moot because the respondent’s conditional release had been revoked by the time the Appellate Court considered the case.

The Appellate Court’s judgment was vacated and the appeal dismissed.

People v. Hill, 2011 IL 110928 (No. 110928, 10/27/11)

1. An appeal is rendered moot when intervening events preclude a reviewing court from granting effective relief. Because Supreme Court Rule 416(c) requires the State to file a statement of intent to seek a death sentence within 120 days of arraignment, the trial court erred by allowing the State to file such notice 247 days after arraignment. However, the Supreme Court concluded that it was unable to grant effective relief because: (1) defendant received a 60-year-prison-term rather than a death sentence, and (2) there was no reason to believe that the sentencing court was influenced by defendant’s eligibility for the death penalty. Therefore, the issue was moot.

2. Under the “public interest exception” to the mootness doctrine, a reviewing court may consider an otherwise moot issue which involves a question of public importance which is likely to recur, if there is a need for an authoritative determination to guide lower courts and authorities. Because the death penalty has been abolished in Illinois, it is unlikely that issues are likely to arise concerning the untimely filing of a statement of intent to seek a death sentence. Similarly, there is no need for an authoritative determination from the Supreme

Court. Under these circumstances, the “public interest” exception is inapplicable.
(Defendant was represented by former Assistant Defender Steve Becker, Chicago.)

People v. Holt, 2014 IL 116989 (No. 116989, 11/20/14)

Defendant argued on appeal that trial counsel rendered ineffective assistance by failing to argue that she was fit to stand trial. Although defendant was found unfit in the trial court, by the time the case was on appeal she had been restored to fitness, making the issue moot. The Supreme Court nonetheless addressed the issue under the public interest exception to the mootness doctrine.

The public interest exception has three requirements: (1) the issue must be public rather than case-specific; (2) an authoritative decision is needed to guide public officers; and (3) the issue is likely to recur. This case presented the court with “the opportunity to begin building a body of law, where none exists” giving guidance to defense counsel regarding how best to represent a client’s interests when counsel believes the client is unfit but the client opposes that position. The court also found that this type of issue, or variants of it, would be likely to recur. The public interest exception was thus satisfied.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

In re Christopher P., 2012 IL App (4th) 100902 (No. 4-10-0902, 9/12/12)

1. An issue on appeal becomes moot where events occurring after the filing of the appeal render it impossible for the reviewing court to grant effectual relief to the complaining party. Generally, a reviewing court will not resolve a moot question solely to establish precedent or govern future litigation.

A moot issue can be addressed under the public-interest exception, which requires: (1) the existence of a question of public importance; (2) the desirability of an authoritative determination for the purpose of guiding public officers in the performance of their duties; and (3) the likelihood that the question will recur. The existence of conflicting authority is not a requirement of the public-interest exception.

The Appellate Court concluded that the question of whether sentencing credit was available for a county treatment program for delinquent minors could be reached even though the issue was moot. The issue of sentencing credit is undeniably a question of public importance. The issue is likely to recur if county public officials believe that the program does not qualify for sentencing credit. Even though the issue is one of first impression, an authoritative determination to guide public officers is desirable.

2. When no direct appeal is taken from an order of probation, and the time for appeal has expired, a reviewing court is precluded from reviewing the propriety of that order in an appeal from a subsequent revocation of probation, unless the underlying judgment of conviction is void.

Respondent appealed from an order denying him sentencing credit upon his commitment to the Department of Juvenile Justice following revocation of probation. Because this order was entered when a new sentence was imposed upon revocation of probation, and the appeal from the resentencing order was timely filed, the Appellate Court had jurisdiction to consider the issue.

(Respondent was represented by Assistant Defender Jacqueline Bullard, Springfield.)

In re Darius L., 2012 IL App (4th) 120035 (No. 4-12-0035, 9/12/12)

1. An issue on appeal becomes moot where events occurring after the filing of the appeal render it impossible for the reviewing court to grant effectual relief to the complaining

party. Generally, a reviewing court will not resolve a moot question solely to establish precedent or govern future litigation.

A moot issue can be addressed under the public-interest exception, which requires: (1) the existence of a question of public importance; (2) the desirability of an authoritative determination for the purpose of guiding public officers in the performance of their duties; and (3) the likelihood that the question will recur. The existence of conflicting authority is not a requirement of the public-interest exception.

The Appellate Court concluded that the question of whether sentencing credit was available for a county treatment program for delinquent minors could be reached even though the issue was moot. The issue of sentencing credit is undeniably a question of public importance. The issue is likely to recur if county public officials believe that the program does not qualify for sentencing credit. Even though the issue is one of first impression, an authoritative determination to guide public officers is desirable.

2. When no direct appeal is taken from an order of probation, and the time for appeal has expired, a reviewing court is precluded from reviewing the propriety of that order in an appeal from a subsequent revocation of probation, unless the underlying judgment of conviction is void.

Respondent appealed from an order denying him sentencing credit upon his commitment to the Department of Juvenile Justice following revocation of probation. Because this order was entered when a new sentence was imposed upon revocation of probation, and the appeal from the resentencing order was timely filed, the Appellate Court had jurisdiction to consider the issue.

(Respondent was represented by Assistant Defender Jacqueline Bullard, Springfield.)

In re Jabari C., 2011 IL App (4th) 100295 (No. 4-10-0295, 12/2/11)

A question is moot when no actual controversy exists or when intervening events occur that render it impossible for the court to grant effectual relief to the complaining party. Generally, where the only relief sought is to set aside a sentence, the question of its validity becomes moot when the sentence has been served.

Respondent complained on appeal that he was entitled to an additional day of credit against his sentence of commitment to the Department of Corrections, Juvenile Division for 364 days or upon attaining the age of 21, whichever comes first. Although more than 364 days had elapsed before respondent filed his brief, the issue was not moot. Respondent had been released on parole before serving the entire sentence and was still subject to revocation of parole and recommitment for the remainder of his unserved sentence.

(Respondent was represented by Assistant Defender Jacqueline Bullard, Springfield.)

In re Shelby R., 2012 IL App (4th) 110191 (No. 4-11-0191, 8/22/12)

An appeal is moot where events occurring after the filing of the appeal render it impossible to grant effectual relief to the complaining party. Where the relief sought is to set aside a sentence, the question of the validity of its imposition is moot when the sentence has been served.

A public-interest exception exists which requires: (1) the existence of a question of public importance; (2) the desirability of an authoritative determination for the purpose of guiding public officers in the performance of their duties; and (3) the likelihood that the question will reoccur.

The public-interest exception was satisfied where the issue on appeal was a question of first impression: whether a minor may be incarcerated in the Department of Juvenile

Justice for unlawful consumption of alcohol. How long a minor should be incarcerated presents a question of public importance. Resolution of the issue will provide needed guidance to public officials. The issue is likely to recur when public officials believe that committing a minor to the Department for unlawful consumption of alcohol is statutorily authorized, but will continue to evade review due to the shortness of the sentence.

The Appellate Court rejected the State's argument that cases of first impression never qualify under the public-interest exception because where no precedent exists, no authoritative resolution is needed. The existence of conflicting precedent is not an element of the public-interest exception.

(Respondent was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Henderson, 2011 IL App (1st) 090923 (No. 1-09-0923, 11/17/11)

1. Courts generally will not review moot issues. The purpose of this rule is to avoid consideration of cases where the parties no longer have a personal stake in the case's outcome. A case can become moot due to a change in circumstances while an appeal is pending.

There are three exceptions to the mootness doctrine: (1) the public-interest exception; (2) the capable-of-repetition-yet-evading-review exception; and the collateral-consequences exception. The public-interest exception permits a court to consider an otherwise moot issue when: (1) the question presented is of a public nature; (2) an authoritative determination is necessary for future guidance of public officers; and (3) a likelihood exists that the question will recur.

The defendant's appeal from the dismissal of his post-conviction petition became moot due to defendant's completion of service of his sentence, including his MSR term. The question of whether the trial court can summarily dismiss a *pro se* post-conviction petition due to an unnotarized verification affidavit nonetheless could be reached under the public-interest exception.

The question of whether the trial court can summarily dismiss a petition due to an unnotarized verification affidavit is a question of a public nature that affects a large number of criminal defendants who file petitions every year. An authoritative determination is necessary for the future guidance of trial court judges, who are public officers. A likelihood exists that the issue will arise in the future in light of the sheer volume of petitions being filed and "the fact that this is at least the second case this year in which the State has argued that this is an appropriate basis for first-stage dismissal."

2. A void judgment may be attacked directly or collaterally in any court at any time. Although a reviewing court is not vested with authority to consider the merits of a case merely because the dispute involves an order that is or is alleged to be void, the lack of standing to file a post-conviction petition is not a jurisdictional defect that deprives the court of the authority to consider the merits of an argument that a judgment is void.

3. Generally, it is appellant's burden to properly complete the record on appeal. Any doubts arising from the incompleteness of the record will be construed against the appellant and in favor of the judgment rendered in the lower court. This rule is relaxed where the defendant can prove that the record is incomplete due to no fault of his own, as well as demonstrate that there is a colorable need for the missing portion of the record in order to have appellate review. If defendant can establish both prongs, the State then must show that there are other means to afford adequate review.

The indictment was not included in the record on appeal and both parties' efforts to locate a copy of the indictment were unsuccessful. The indictment was relevant to defendant's argument that his criminal conviction was void as it did not allege an offense that was subject

to transfer from juvenile to criminal court. However, the court concluded that defendant had not established a colorable need for the indictment as his claim that he was not charged with a transferable offense was based on speculation.

Defendant conceded that he did not know the exact language used in the indictment. He conceded that he may have committed a transferable offense. “Thus it appears from defendant’s argument that it is equally probable that an error did or did not occur but he asks us to assume the former.” Defendant’s decision to waive reading of the indictment, and not to challenge his transfer to criminal court, even after it was questioned why defendant was before the criminal court, suggests that counsel’s review of the indictment revealed no defects. “We will not equate defendant’s fishing expedition with a colorable need for the indictment.”

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Hill, 402 Ill.App.3d 903, 934 N.E.2d 43, 2010 WL 2675077 (1st Dist. 2010)

The Appellate Court held that it was not a moot question whether the State violated Supreme Court Rule 416(c) by failing to notify the defense within 120 days of arraignment that it intended to seek the death penalty. The circuit court found defendant death eligible, but declined to sentence defendant to death, instead sentencing him to the maximum term of 60 years’ imprisonment. Although defendant did not receive a death sentence, the circuit court may have imposed a lesser term of imprisonment had it not found defendant death eligible. This error was capable of being remedied by a new sentencing hearing.

(Defendant was represented by Assistant Defender Steven Becker, Chicago.)

People v. Holt, 2013 IL App (2d) 120476 (No. 2–12–0476, 10/29/13)

An otherwise moot case may be considered by a reviewing court where the appellant was found unfit to stand trial because of a mental condition, the appeal is moot because the appellant was subsequently found to be fit, and the finding of unfitness “could return to plague the [defendant] in some future proceedings or could affect other aspects of the [defendant’s] life.” Where defendant was found unfit to stand trial but during the course of the appeal was adjudicated fit to stand trial, the court reached the issue raised on appeal - whether defense counsel was ineffective during the fitness proceeding. The court stated, “Beyond the stigma attached to the finding and treatment order, defendant could suffer adverse legal consequences including, for instance, limitations on her right to own firearms.”

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Horsman, 406 Ill.App.3d 984, 943 N.E.2d 139 (2d Dist. 2011)

The public interest exception allows a reviewing court to reach the merits of an issue that might otherwise be moot where: (1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question. The public interest exception is narrowly construed and requires a clear showing of each criterion.

The public interest exception allowed the court to decide whether electronic home monitoring could satisfy the requirement of a sentence of at least 180 days’ imprisonment for anyone convicted of a fourth or subsequent violation of driving on a revoked license, where the revocation was due to a conviction for DUI or leaving the scene of an accident involving death or personal injury. 625 ILCS 5/6-303(d-3). The issue involves statutory construction, which is of broad public interest, and therefore of a public nature. There is a need for an authoritative determination of the issue as it is an issue of first impression. There is also a likelihood of recurrence of the question as two circuit court judges have ruled differently on

the issue in separate cases.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Jones, 2012 IL App (1st) 093180 (No. 1-09-3180, 5/1/12)

A post-conviction petition that is timely filed while the petitioner is serving any sentence imposed, including any period of mandatory supervised release, does not become moot when the petitioner has fully served his sentence. The court disagreed with the contrary holding of **People v. Henderson**, 2011 IL App (1st) 090923, which reasoned that because defendant no longer needed the assistance of the Post-Conviction Hearing Act to secure his liberty, he lost standing under the Act.

1. Proceedings under the Post-Conviction Hearing Act are civil in nature. A statutory civil cause of act that is timely filed cannot be declared moot by subsequent events.

2. Post-conviction petitions frequently experience delays not found in other categories of cases before they receive final review. They can be filed after the conclusion of direct review. The full litigation of the petition can entail one or more appeals. Public offices charged with representing parties in these proceedings suffer from understaffing and underfunding, which predicably result in severe backlogs.

3. The Illinois Supreme Court has declined to narrowly construe the Act, a remedial statute, to preclude a post-conviction remedy in every case in which the petition is not filed and the hearing completed before the petitioner has fully served his sentence, mindful of the “obvious advantages in purging oneself of the stigma and disabilities which attend a criminal conviction.”

4. “It would frustrate justice to shut the door on the one avenue for Illinois prisoners to obtain relief from a criminal conviction on constitutional grounds because the State and Appellate Defender’s office delayed, through no fault of their own, the petitioner’s case for so long that he eventually serves his entire sentence and is released.”

People v. McCoy, 2014 IL App (2d) 130632 (No. 2-13-0632, 12/22/14)

1. An appeal is moot where it presents no actual controversy and intervening events make it impossible for the reviewing court to grant effective relief. Reviewing courts do not decide moot issues unless an exception to the mootness doctrine applies.

Although defendant had been restored to fitness by the time the Appellate Court considered his appeal concerning his right to demand a jury determination of fitness, the court found that two exceptions to the mootness doctrine applied. Therefore, the court elected to reach the issue.

2. First, a court may elect to reach moot issues that are capable of repetition yet evade review. This exception applies where: (1) the challenged action is of such short duration that it cannot be litigated before the action ceases, and (2) there is a reasonable expectation that the complaining party will be subjected to the same action again. This exception generally does not apply where factual issues are raised, but does apply where purely legal questions are at issue.

Here, a purely legal issue was involved - whether an arguably unfit defendant is entitled to demand a jury determination of fitness. In addition, the court found that it was unlikely defendant could bring a timely challenge to the trial court’s refusal to allow a jury determination of fitness.

Finally, because the defendant had exhibited mental health issues, there is a reasonable expectation that questions regarding his fitness will recur and that the trial court will continue to ignore defendant’s demands for a jury. Under these circumstances, the

exception to the mootness doctrine for issues that are capable of repetition yet evade review applies.

3. Second, the public interest exception to the mootness doctrine applies. Review of an otherwise moot issue is permitted under this exception where the question presented is of a public nature, an authoritative determination is desirable for guidance of public officers, and the question is likely to recur. The court noted that there is no authoritative precedent concerning whether an arguably unfit defendant may demand a jury determination of fitness, and that the issue is one of public interest. In addition, the court held that the question would likely recur in view of defendant's mental health history.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.

People v. Saleh, 2013 IL App (1st) 121195 (No. 1-12-1195, 8/14/13)

A challenge to the validity of a sentence becomes moot once the entire sentence has been served. But service of the sentence does not moot a challenge to the validity of a conviction. Nullification of a conviction may hold important consequences for a defendant, as a conviction may trigger severe legal, social, employment and financial repercussions.

Defendant's appeal from the revocation of his supervision did not become moot when he completely served the sentence imposed upon the revocation of supervision. An order of supervision is not a final judgment of conviction. If a defendant successfully completes supervision, the charges are dismissed. If supervision is not completed successfully, defendant may be found guilty and sentenced. Defendant's challenge to the revocation of his supervision is therefore a challenge to the final judgment of conviction entered upon revocation of supervision, not just to the sentence imposed when supervision was revoked.

(Defendant was represented by Assistant Defender Philip Payne, Chicago.)

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§2-6(c)
Costs

In re Shelby R., 2013 IL 114994 (No. 114994, 9/19/13)

An appeal is moot if no controversy exists or if events have occurred which foreclose the reviewing court from granting effective relief. Where an appeal involves the validity of a sentence, the appeal is rendered moot if the sentence has been completed.

Generally, courts will not decide moot questions. However, several exceptions to the above rule have been recognized, including the "public interest" exception. This exception allows a reviewing court to consider an otherwise moot issue upon a clear showing that: (1) the question presented is of a public nature, (2) an authoritative determination is needed for future guidance of public officers, and (3) the question is likely to recur. Application of the public interest exception is narrowly construed.

The court rejected the State's argument that the second factor - a need for an authoritative determination of the question - is satisfied only if there is conflicting precedent on a question or some other circumstance makes an authoritative determination "especially useful" to public officers. Although the existence of conflicting case law is a factor to be considered in determining whether the public interest exception applies, there may be a need for an authoritative determination even in the absence of a conflict in case law.

Here, the court found that there was a need for an authoritative determination of an issue of first impression - whether a juvenile may be committed to the Department of

Corrections for underage drinking. The court noted that the issue involves the liberty interests of minors, and found that guidance was necessary for juvenile court judges, prosecutors, and defense attorneys.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Williams, 235 Ill.2d 286, 920 N.E.2d 1060 (2009)

1. In counties of less than 3,000,000 population, the State's Attorney is entitled to a fee of \$50 for prosecuting or defending an appeal, unless the defendant prevails on all issues. Thus, unless an appeal results in the conviction being vacated, the \$50 fee is to be assessed.

2. The court declined to reach defendant's alternative argument – that the State's Attorney is not entitled to the \$50 fee where the appeal is prosecuted or defended by the State's Attorney's Appellate Prosecutor. The court found that the issue was forfeited because it had not been raised in the Appellate Court or in the petition for leave to appeal.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Clark, 404 Ill.App.3d 141, 935 N.E.2d 1147 (2d Dist. 2010)

55 ILCS 5/4-2002(a) authorizes a \$50 fee to the State's Attorney for each appeal "prosecuted or defended by him." The court rejected the argument that the State's Attorney does not "prosecute or defend" an appeal, and is therefore not entitled to the fee, when the case is handled by the State's Attorney's Appellate Prosecutor.

Because SAAP operates only at the direction and pleasure of the State's Attorney (725 ILCS 210/4.01), the court found that an appeal is "prosecuted or defended by" the State's Attorney even when SAAP is involved. Furthermore, the State's Attorney ultimately pays for representation by SAAP through a fund made up of contributions from the counties and used exclusively for SAAP's expenses. (725 ILCS 210/9).

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

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§2-6(d) Briefs

People v. Dabbs, 239 Ill.2d 277, 940 N.E.2d 1088 (2010)

Under Supreme Court Rule 341(h)(7), points raised but not argued are waived. The court found that the defendant abandoned an equal protection claim which he raised in the petition for leave to appeal but failed to argue in the opening or reply brief or at oral argument.

(Defendant was represented by Assistant Defender Michelle Zalisko, Mt. Vernon.)

People v. English, ___ Ill.App.3d ___, ___ N.E.2d ___ (3d Dist. 2011) (No. 3-10-0764, 6/27/11)

Questions not raised by appellants in the original brief cannot be raised in the reply brief. A contrary practice would permit appellants to argue questions in their reply briefs as to which counsel for appellees would have no opportunity to reply. Therefore, such arguments need not be considered.

Appellant's reply brief raised for the first time the issue of ineffective assistance of appellate counsel to circumvent an argument that the doctrine of *res judicata* barred

consideration of the underlying claim of defendant's post-conviction petition. Therefore, this claim need not be considered.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Falletti, 2012 IL App (4th) 120107 (No. 4-12-0107, 10/11/12)

The State appealed from an order discharging defendant due to the violation of his statutory right to a speedy trial. The Appellate Court refused to consider the arguments made by the State in its brief, finding that those arguments were forfeited by the State's failure to make them in the circuit court. With respect to the argument that the State did make in the circuit court, the Appellate Court found it had been abandoned by the State's failure to include it in its brief. Supreme Court Rule 341(h)(7) ("[p]oints not argued are waived").

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

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§2-6(e)

Effect of Decisions

Chaidez v. United States, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2013 WL 610201 (No. 11-820, 2/20/13)

A case announces a new rule inapplicable to convictions that were final when the rule was announced if it breaks new ground or imposes a new obligation. **Teague v. Lane**, 489 U.S. 288 (1989). To put it differently, a case announces a new rule when the result was not dictated by precedent existing at the time the defendant's conviction became final. A holding is not so dictated unless it would have been apparent to all reasonable jurists.

A case does not announce a new rule when it merely applies a principle governing a prior decision to a different set of facts. A court will rarely state a new rule for **Teague** purposes when all that it does is apply a general standard to the kind of factual circumstances that the standard was meant to address.

Padilla v. Kentucky, 559 U.S. 356 (2010), which held that the Sixth Amendment requires defense attorneys to inform non-citizen clients of the deportation consequences of guilty pleas, announced a new rule. **Padilla** did not merely apply the general standard of **Strickland v. Washington**, 466 U.S. 668 (1984), to a different factual situation.

Before deciding whether the failure to provide advice about deportation consequences fell below **Strickland**'s objective standard of reasonableness, **Padilla** considered the threshold question whether advice about deportation was categorically removed from the scope of the Sixth Amendment. **Padilla** had to develop new law establishing that the Sixth Amendment applied before it could assess the performance of Padilla's lawyer under **Strickland**. Because **Padilla** asked *whether* the **Strickland** test applied before asking *how* it applied, the Court's answer required a new rule. **Padilla** answered a question about the Sixth Amendment's reach that had been left open and in a way that altered the law of most jurisdictions. No existing precedent dictated the answer. **Padilla**'s holding would not have been, and in fact was not, apparent to all reasonable jurists prior to the decision in **Padilla**.

Davis v. United States, ___ U.S. ___, 131 S.Ct. 2419, ___ L.Ed.2d ___, 2011 WL 2369583 (2011) (No. 09-11328, 6/16/11)

Retroactivity jurisprudence is concerned with whether a new rule is available on direct review as a potential ground for relief. Retroactive application does not determine what appropriate remedy, if any, the defendant should obtain for a constitutional violation.

Retroactive application of a new rule of Fourth Amendment law thus raises the question of whether a suppression remedy applies; it does not answer that question. Although **Arizona v. Gant**, 556 U.S. ___, 129 S.Ct. 1710, ___ L.Ed.2d ___ (2009), applies retroactively to all cases in which defendant's conviction was not final when **Gant** was decided, suppression of evidence does not automatically follow from **Gant**'s application.

People v. Clemons, 2012 IL 107821 (No. 107821, 4/19/12)

1. The doctrine of *stare decisis* expresses the policy of the courts to stand by precedents and not to disturb settled points. A question once deliberately examined and decided should be closed to further argument, ensuring that the law will develop in a principled, intelligent fashion, immune from erratic changes. Any departure from *stare decisis* demands special justification. Prior decisions will not be overruled absent good cause or compelling reasons. Good cause exists, for example, where the decisions are unworkable or poorly reasoned.

People v. Hauschild, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), held that the sentence for armed robbery while armed with a firearm violates the proportionate penalties clause of the Illinois Constitution because the sentence for that offense is more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or II weapon.

2. When **Hauschild** was decided, the armed violence statute excluded armed robbery, but not robbery as a predicate offense. Subsequent to **Hauschild**, P.A. 95-688 amended the armed violence statute to delete the reference to armed robbery and exclude as a predicate offense "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range."

The court agreed with the State that under the amended statute, robbery may no longer serve as a predicate offense. The court disagreed that P.A. 95-688 was a clarifying amendment that should be treated as a legislative declaration of the meaning of the prior statute. An amendment can serve to clarify the legislature's original intent only where it is adopted prior to a court's construction of the preamended statute. While the General Assembly prospectively change a judicial construction of a statute if it believes that the judicial interpretation is at odds with legislative intent, it cannot effect a change in that construction by a later declaration of what it had originally intended.

3. Armed violence is a broader offense compared to the more specific offense of armed robbery with a firearm in that it can be committed with weapons other than a firearm. But the identical-elements test has never required that the two offenses be equally specific. It is enough that the elements of armed robbery with a firearm and armed violence based on robbery with a category I or II weapon are identical. **Hauschild** did not misapply the identical-elements test.

4. The identical-elements test is supported by the constitutional text of the Illinois Constitution of 1970, which provides that "[a]ll penalties shall be determined [] according to the seriousness of the offense." The test provides a method for determining whether the legislature satisfied that constitutional requirement. If the legislature determines that the exact same elements merit two different penalties, then one of these penalties has not been set in accordance with the seriousness of the offense because the legislature has made two different judgments about the seriousness of one offense.

5. The Illinois proportionate-penalties clause is not synonymous with the cruel-and-

unusual-punishments clause of the eighth amendment as it contains a requirement that all penalties be set with the objective of restoring the offender to useful citizenship. In any event, the United States Supreme Court has never addressed the question whether the eighth amendment permits different penalties for identical offenses.

6. The Illinois Supreme Court adopted the identical-elements test because it found it illogical that identical offenses could result in different penalties. Reliance on common sense and sound logic does not render the identical-elements test of questionable origin as argued by the State. “Common sense and sound logic need not be strangers to the law.”

7. The identical-elements test does not invade the province of the legislature to set penalties for offenses because a key feature of the test is objectivity. The court does not make a subjective determination of the gravity of an offense or the severity of the penalty imposed. Therefore, there is no risk that the court will second-guess the legislature.

8. In response to the State’s argument that **Hauschild** created a new disparity because the sentence for armed violence predicated on robbery with a category I or II weapon (15 to 30 years) is now greater than the sentence for armed robbery with a firearm (6 to 30 years), the court disagreed that the mere opportunity for a new constitutional attack means that the test is unworkable.

9. The State complained that prosecutors can no longer obtain an enhanced penalty for armed robbery with a firearm because **Hauschild** rendered that enhancement void *ab initio*, and the legislature eliminated robbery as a predicate offense to armed violence when it enacted P.A. 95-688, but did not re-enact the armed-robbery enhancements. This problem does not implicate the workability of the identical-elements test. The solution is for the legislature to engage in more careful drafting.

Because the State had not demonstrated good cause or identified compelling reasons for departing from *stare decisis*, the court declined to overrule **Hauschild** or abandon the identical-elements test.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Morris & Holborow, 236 Ill.2d 345, 925 N.E.2d 1069 (2010)

1. Under **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), due process is violated where a defendant is not advised that a mandatory supervised release term will be added to the sentence negotiated under a plea agreement. The court concluded that **Whitfield** created a “new” rule for purposes of retroactivity analysis.

In general, a case announces a “new” rule when the result is not dictated by precedent existing at the time the conviction became final. A court considering a case on collateral review has the obligation to determine, as a threshold matter, whether granting the relief sought would create a “new” rule. A court should refrain from issuing “new” rules in cases that are on collateral review.

2. “New” constitutional rules of criminal procedure are inapplicable to cases in which the conviction was final on the date the new rule was announced, unless the rule: (1) places certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to prescribe, or (2) the new rule is a “watershed” rule of criminal procedure (i.e., one that is implicit in the concept of ordered liberty and without which the likelihood of an accurate conviction is seriously diminished).

Because the **Whitfield** holding satisfies neither of these two exceptions to the non-retroactivity rule, the court erred in **Whitfield** by announcing a new rule that could not be applied on collateral review. Therefore, it will not be applied in post-conviction proceedings where the conviction became final before December 20, 2005, the date of the **Whitfield**

opinion.

3. See also **GUILTY PLEAS**, §24-6(d).

The orders denying post-conviction relief were affirmed.

(Defendant Morris was represented by Assistant Defender Rebecca Levy, Chicago.)

(Defendant Holborow was represented by Assistant Defender Michael Delcomyn, Springfield.)

People v. Sanders, 238 Ill.2d 391, 939 N.E.2d 352 (2010)

For purposes of determining the retroactivity of a decision, a case announces a new rule when it breaks new ground or imposes a new obligation on the states or federal government. The result must not be dictated by precedent existing at the time defendant's conviction became final. The fact that a decision is within the logical compass of an earlier decision or is controlled by an earlier decision is not conclusive. The standard is whether a court considering defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule was required by the constitution.

Teague v. Lane, 489 U.S. 288 (1989).

The court determined that **People v. Strain**, 194 Ill.2d 467, 742 N.E.2d 315 (2000), announced a new rule that does not apply retroactively to convictions that were final when **Strain** was decided. **Strain** held that where gang evidence is integral to defendant's trial, the defense must have the opportunity to question prospective jurors regarding gang bias. **Strain** was a clear break from precedent, which held in accordance with Supreme Court Rule 431 that the scope and extent of *voir dire* is within the discretion of the trial court. It was not enough that **Strain** was an extension of prior precedent, where no court would have felt compelled by that precedent to reach the conclusion reached by **Strain**.

People v. Aguilar, 408 Ill.App.3d 136, 944 N.E.2d 816 (1st Dist. 2011)

1. Under Illinois law, courts give effect to a clear expression of legislative intent concerning whether a statute is to be applied retroactively. Where there is no clear expression of legislative intent, procedural amendments are generally applied retroactively, while substantive amendments are applied prospectively.

Amendments to the definition of the offense of aggravated unlawful use of a weapon were not intended to apply retroactively to conduct which occurred before the effective date. Because the public act (P.A. 96-742) stated that it would be effective upon becoming a law, the court concluded that it contained an unambiguous statement of legislative intent that the new provisions were to be applied prospectively.

The court acknowledged that where the legislature amends a statute shortly after a controversy concerning the meaning of the statute, it is presumed that the amendment was intended as a legislative interpretation of the original legislation. However, a subsequent amendment does not replace the plain language of the statute as the best evidence of the legislature's original intent. In addition, the amendment here went further than would have been necessary to correct any possible belief by the legislature that the courts had misinterpreted legislative intent.

2. Only the Illinois Supreme Court has authority to overrule its decisions. Thus, the Appellate Court lacked authority to reconsider Illinois Supreme Court precedent interpreting the Illinois state constitution, even where it seems that such precedent is no longer valid under U.S. Supreme Court case law.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

People v. Avery, 2012 IL App (1st) 110298 (No. 1-11-0298, 6/21/12)

1. A new constitutional rule of criminal procedure is not applied retroactively to convictions that were final when the rule was adopted, unless it falls within one of two narrow exceptions. **Teague v. Lane**, 489 U.S. 288 (1989). A case announces a new rule when it breaks new ground or imposes a new obligation on state or federal government. The fact that a court says that its decision is within the “logical compass” of an earlier decision or is “controlled” by a prior decision is not conclusive of whether the current decision announces a new rule. The test is whether a court considering the claim at the time that the conviction became final would have felt compelled by existing precedent to conclude that the rule was constitutionally required.

Illinois has adopted the **Teague** definition of a “new rule.” Illinois courts have explained that if there was a significant difference of opinion on the issue in the lower courts prior to a rule being adopted, this would indicate that the decision is a new rule and not merely an application of an earlier decision to a different set of facts. Virtually no case that prompts a dissent on the relevant legal point could be said to be “dictated” by prior decisions.

2. **People v. White**, 2011 IL 109616, announced a new rule that cannot be applied to convictions, such as defendant’s, that were final when **White** was announced. **White** held that where a defendant pleads guilty to a charge with a firearm enhancement and the factual basis for the plea establishes that a firearm was used in the commission of the offense, a sentence that does not include the firearm enhancement is void because it is not authorized by statute, and the plea must be vacated.

Prior to **White**, there was “confusion as to whether the State could, in its discretion, negotiate pleas that did not include the firearm enhancement for first degree murder, even where the factual basis for the plea included the use of a firearm in the commission of the offense, since it was within the State’s discretion to determine what charges to pursue.” That confusion was evidenced by the decision in defendant’s direct appeal, which rejected his argument that his guilty plea was void, reasoning that it was the understanding of the parties that defendant was pleading guilty to first degree murder without the enhancement. **White** changed the law and represented a “sharp departure from existing case law” by holding that the firearm enhancement is automatically triggered when it is part of the factual basis for the underlying offense, regardless of whether the State intends to pursue it as an aggravating factor.

After concluding that neither **Teague** exception applied, the Appellate Court affirmed defendant’s conviction and sentence.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

People v. Denson, 407 Ill.App.3d 1039, 946 N.E.2d 933 (2d Dist. 2011)

55 ILCS 5/4-2002(a) authorizes a \$50 fee for the State’s Attorney for each appeal “prosecuted or defended by him.” Under **People v. Williams**, 235 Ill.2d 286, 920 N.E.2d 1060 (2009), the State’s Attorney is entitled to the fee even when the defendant is partially successful on appeal.

The Appellate Court concluded that the State’s Attorney did not “defend” the appeal where the prosecution confessed error to the only issue which defendant raised. The State’s request for the \$50 fee was denied.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

People v. Dunmore, 2013 IL App (1st) 121170 (No. 1-12-1170, 12/24/13)

Defendant entered a negotiated guilty plea to an unlawful use of a weapon charge, and

was sentenced to 18 months' probation and ordered to pay fines and fees. After his probation was revoked for committing another offense, he was sentenced to two years in prison. Defendant had completed his sentence by the time of this appeal, and challenged only the revocation of probation and the assessment of fees and fines.

1. While the appeal was pending, the Supreme Court issued **People v. Aguilar**, 2013 IL 112116, which held that the statute to which defendant pleaded guilty (5/24-1.6(a)(1), (a)(3)(A)) was unconstitutional on its face. The court rejected defendant's request that it leave the conviction intact and limit its consideration to the revocation of probation and payment of fees and fines.

Once **Aguilar** held that the section of the Criminal Code on which the plea rested was facially unconstitutional, the statute was rendered void *ab initio*. In addition, judicial decisions declaring a statute unconstitutional apply to cases pending on direct review. Because defendant's conviction was void and courts have an independent duty to vacate void orders, **Aguilar** required that the void conviction be vacated once it came before the court.

2. The State sought a remand to reinstate charges which had been dismissed as part of the plea agreement, and asked the court to review the constitutionality of the unlawful use of weapon and aggravated unlawful use of weapon charges which it might seek to reinstate. The court declined to consider whether **Aguilar** would render unconstitutional charges which had not yet been reinstated. Reviewing courts should not consider abstract questions or render advisory opinions.

(Defendant was represented by Assistant Defender Jean Park, Chicago.)

People v. Hodges, 2011 IL App (2d) 110165 (No. 2-11-0165, 12/12/11)

In **People v. Madrigal**, 241 Ill.2d 463, 948 N.E.2d 591 (2011), the Illinois Supreme Court held that subsection (a)(7) of the identity-theft statute (720 ILCS 5/16G-15(a)(7)) was facially unconstitutional because it lacked a culpable mental state and thus potentially punished innocent conduct. In the course of its decision, the court distinguished subsection (a)(7) from other subsections, including subsection (a)(4), which it stated "also require the additional element of criminal intent or knowledge," and therefore "are not at issue in this case and clearly do not fall within the parameters of the line of cases that deal with statutes that potentially punish innocent conduct."

The Appellate Court held that this statement by the Supreme Court precluded any challenge to the constitutionality of subsection (a)(4), even though it was "not at issue in the case and the court's statement appears to be *obiter dictum*." Even *obiter dictum* of a court of last resort can be tantamount to a decision, and therefore binding in the absence of a contrary decision of that court. No exception to this rule appears in existing case law. No decision exists contrary to **Madrigal**. Therefore, the Appellate Court was bound by the *obiter dictum* of **Madrigal**.

McLaren, J., dissented. The reference in **Madrigal** to subsection (a)(4) was not required for either the logical analysis of the merits of the appeal or the holding, and thus constituted *obiter dictum*. Generally, such comments are not binding. Moreover, **Madrigal** merely identified references to criminality in subsections (a)(1) through (a)(5). The court's analysis did not explain how the language in subsection (a)(4) made the proscribed actions criminal. Therefore, the *obiter dictum* of **Madrigal** should not control. The rationale and holding of **Madrigal** should control, which the dissent submitted supported the conclusion that subsection (a)(4) was unconstitutional.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Robinson, 2015 IL App (1st) 130837 (No. 1-13-0837, 6/26/15)

In **People v. Jolly**, 2014 IL 117142, the Illinois Supreme Court held that where the State's participation in a **Krankel** hearing is "anything more than *de minimis*," there is an unacceptable risk that the hearing will be turned into an adversarial proceeding, where both the State and trial counsel oppose the defendant. It is reversible error if the State is allowed to participate in an adversarial manner.

The Appellate Court held that the decision in **Jolly** applied retroactively since it did not announce a new rule of criminal procedure, but instead simply applied a well-established principle to the facts of Jolly's case.

(Defendant was represented by Assistant Defender Kristen Mueller, Chicago.)

People v. Stephens, 2012 IL App (1st) 110296 (No. 1-11-0296, 10/26/12)

A trial court must obey the clear and unambiguous directions in a mandate issued by a reviewing court. A reviewing court has the inherent authority to compel compliance with its orders.

On direct appeal, the Appellate Court vacated defendant's concurrent sentences and remanded for resentencing to consecutive terms. On remand, the trial court issued a corrected mittimus providing that defendant's previously-imposed sentences run consecutively. It did not conduct a new sentencing hearing.

The defendant did not appeal from that order. He subsequently filed a post-conviction petition but did not complain in that petition that the trial court had not complied with the Appellate Court's mandate. On appeal from dismissal of that petition, exercising its inherent authority to compel compliance with its mandate, the Appellate Court again vacated defendant's sentences and remanded to the trial court for resentencing.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Thomas, 2014 IL App (3d) 120676 (No. 3-12-0676, 10/27/14)

Defendant argued that his felony conviction for resisting arrest should be reduced to a misdemeanor because in his stipulated bench trial he did not stipulate that a police officer had been injured (which was the basis for making his conviction a felony). The State argued that since defendant stipulated that the evidence was sufficient to convict, he could not now argue that the evidence was insufficient.

The court rejected the State's argument. In defendant's first appeal, the court held that the stipulated bench trial had not been tantamount to a guilty plea. Accordingly, under the law of the case doctrine, defendant was not precluded from arguing in his second (current) appeal that the State failed to prove him guilty of felony resisting arrest.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Tripp, 407 Ill.App.3d 813, 944 N.E.2d 405 (1st Dist. 2011)

New constitutional rules of criminal procedure do not apply to convictions that were final when the new rule was announced. A case announces a new rule when it breaks new ground or imposes a new obligation on the states or federal government. A decision constitutes a new rule unless a state court considering the claim at the time the conviction became final would have felt compelled by existing precedent to conclude that the rule was required by the constitution.

Two exceptions to this rule of non-retroactivity exist: (1) the new rule places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; or (2) the new rule requires the observance of those procedures that are

implicit in the concept of ordered liberty. Under this second exception, the new rule must represent a watershed rule of criminal procedure implicit in the concept of ordered liberty and central to the accuracy of the conviction. It is not enough that the new rule is based on a bedrock right or is fundamental in the abstract sense. It must constitute a previously-unrecognized bedrock procedural element that is essential to the fairness of a proceeding.

Arizona v. Gant, __ U.S. __, 129 S.Ct. 1710, __ L.Ed.2d __ (2009), constitutes a new rule. Prior to **Gant**, police were permitted to search the passenger compartment of an arrestee's automobile contemporaneous to an arrest, so long as the arrestee was a recent occupant of the vehicle. In contrast, **Gant** limits an officer's ability to search a vehicle incident to a recent occupant's arrest to where: (1) the arrestee is within reaching distance of the passenger compartment at the time of the search; or (2) it is reasonable to believe that the vehicle contains evidence of the offense of the arrest.

Neither exception to the rule of non-retroactivity applies to **Gant**. **Gant** does not legalize primary, private individual conduct and does not reinterpret a statute. While important, **Gant** is not a watershed rule of criminal procedure implicit in the concept of ordered liberty. It merely introduced a new rule regarding the already-existing limitations placed on officers when conducting a search incident to an arrest.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

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§2-6(f)

Juvenile Proceedings

In re B.C.P., 2013 IL 113908 (No. 113908, 6/20/13)

Supreme Court Rule 660(a), governing appeals in delinquent minor cases, incorporates the criminal appeals rules, but only as to final judgments. Supreme Court Rule 662 allows for certain interlocutory appeals in juvenile cases, but an order granting a motion to suppress is not one of them. Therefore, the provision of Supreme Court Rule 604(a)(1) allowing the State to appeal from an order granting a motion to suppress does not apply to juvenile cases under existing appellate rules.

Exercising its rulemaking authority, the Illinois Supreme Court held that Rule 660(a) should be modified to allow the State to appeal from an interlocutory order suppressing evidence in a juvenile delinquency proceeding. Since the adoption of Rule 660(a), the General Assembly has radically altered the Juvenile Court Act to make the juvenile adjudicatory process more criminal in nature. As a consequence, juveniles receive many of the same protections that criminal defendants receive. In light of this shift, the State has the same interests in appealing a suppression order in a juvenile case that it does in a criminal case: obtaining correction of errors that would otherwise be precluded by the double jeopardy clause; avoiding unfairness in allowing errors favoring the State to be corrected while not allowing correction of errors favoring the defense, resulting in distortion of the development of the law; and eliminating frustration of the primary purpose of a trial – to ascertain the truth of the charges.

Given the compelling case for the need for interlocutory review of suppression orders in juvenile cases, the supreme court saw no need to defer the matter to the rules committee. Extending the expedited appeal process provided by Supreme Court Rule 660A to State

appeals from suppression orders adequately addressed any concern that delays caused by appeals could interfere with the rehabilitation of the minors.

(Respondent was represented by Assistant Defender Gabrielle Green, Ottawa.)

In re Michael D., 2015 IL App (1st) 143181 (No. 1-14-3181, 3/20/15)

Except where a Supreme Court rule provides for an interlocutory appeal, the Appellate Court only has jurisdiction to review final judgments. In criminal cases, the final judgment is the sentence. Similarly, in juvenile cases, the final judgment is the dispositional order. The Appellate Court held that an order of continuance under supervision entered after a finding of delinquency in a juvenile case was not a final judgment.

The trial court may terminate juvenile supervision at any time, and may also vacate the finding of delinquency, if warranted by the conduct of the minor and the ends of justice. Under these circumstances, there was no final judgment providing the Appellate Court with jurisdiction.

Defendant's appeal was dismissed for lack of jurisdiction.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

In re Shatavia S., 403 Ill.App.3d 414, 934 N.E.2d 502, 2010 WL 3330897 (5th Dist. 2010)

Based on her admission, the court placed respondent on supervision for one year, with conditions of community service and restitution. 705 ILCS 405/5-615(a) allows a court to enter an order of continuance under supervision for certain offenses upon an admission by the minor and before proceeding to adjudication.

The Appellate Court rejected the State's argument that there was no final judgment from which an appeal could be taken because the case was continued under supervision. The judgment appealed was not an adjudication of delinquency, but the conditions of supervision. Supreme Court Rule 604(b) authorizes an appeal from an order of supervision by a defendant who seeks review of the conditions of supervision.

(Respondent was represented by Assistant Defender Paige Strawn, Mt. Vernon.)

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§2-7

Standard of Review

§2-7(a)

Generally

Note: Supreme Court Rule 341(e)(3) provides that the appellant's brief must include a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument.

People v. Absher, 242 Ill.2d 77, 950 N.E.2d 659 (2011)

When reviewing a trial court's ruling on a motion to suppress evidence, the reviewing court must accept factual findings that are not contrary to the manifest weight of the evidence. However, the ultimate legal question is reviewed *de novo*.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

People v. Radojcic, 2013 IL 114197 (Nos. 114197, 114214, 11/21/13)

At defendant's trial for several offenses related to a mortgage fraud scheme, the trial court determined that the crime-fraud exception to the attorney-client privilege did not apply. In the course of reversing the trial court's holding, the Supreme Court ruled that the *de novo* standard of review applied.

Generally, the abuse of discretion standard applies when reviewing trial court rulings, because the trial court is in a superior position to weigh witness credibility and resolve conflicts in testimony. Because the State offered no live testimony, however, and only introduced transcripts of grand jury testimony, the trial court and reviewing courts were in the same position in evaluating the evidence. Under these circumstances, *de novo review* was appropriate.

(Defendant was represented by Emily Wood of Chicago.)

People v. Chambers, 2014 IL App (1st) 120147 (No. 1-12-0147, 5/27/14)

In reviewing a trial court's denial of a hearing pursuant to **Franks v. Delaware**, 438 U.S. 154 (1978), there is a presumption of validity concerning the affidavit supporting a search warrant, and a reviewing court will not disturb the trial court's judgment if it is exercised within permissible limits. The standard of review is thus whether the trial court abused its discretion.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

People v. Chestnut, 398 Ill.App.3d 1043, 921 N.E.2d 811 (4th Dist. 2010) (No. 4-09-0338, 1/12/10)

When reviewing the trial court's order on a motion to suppress, a reviewing court will reject the trial court's factual findings only if they are contrary to the manifest weight of the evidence. A finding is contrary to the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding is unreasonable, arbitrary, or not based on the evidence.

The court found that two of the trial judge's factual findings were contrary to the manifest weight of the evidence. However, the trial court did not err by granting the motion to suppress. (See **CONFESSIONS**, §§10-3(c), (d) & **SEARCH & SEIZURE**, §§44-4(b), 44-8(b), 44-11(b)).

People v. Maldonado, 402 Ill.App.3d 411, 930 N.E.2d 1104 (1st Dist. 2010)

The court noted a conflict between appellate districts concerning whether the *de novo* or "abuse of discretion" standard applies when reviewing the prosecution's closing argument at trial. The court declined to resolve the conflict, however, finding that under either standard the prosecutor's single ambiguous remark was insufficient to cause substantial prejudice.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

People v. Rivera, 409 Ill.App.3d 122, 947 N.E.2d 819 (1st Dist. 2011)

Ordinarily, great deference is accorded to jury determinations. Where the evidence at issue does not involve credibility determinations or observations of demeanor, the deference afforded is logically less.

In a prosecution for child pornography, the evidence primarily consisted of a video clip of a female performing fellatio on a male. The jury was in no better position to view the video clip than the court. The court concluded that a simple viewing of the video clip itself created a reasonable doubt of defendant's guilt, as the female in the video was not obviously

adolescent or juvenile in appearance, and reversed the conviction.

People v. Rubio, 392 Ill.App.3d 914, 911 N.E.2d 1216 (2d Dist. 2009)

1. Noting that the Illinois Supreme Court has found that the “manifest weight of the evidence” standard of review, in which reviewing courts defer to the trial court, is based solely on the trial court’s superior position to assess credibility, the Appellate Court concluded that the *de novo* standard of review applies where a trial court finding is based solely on documentary evidence rather than live testimony. Because the trial court’s factual rulings appeared to have been based solely on the contents of a video recording of defendant’s interrogation, and all defense arguments on appeal concerned matters portrayed in the video, the cause was reviewed *de novo*.

However, applying the *de novo* standard, the Appellate Court affirmed the trial court’s ruling that defendant made a knowing waiver of his **Miranda** rights.

2. See also **CONFESSIONS**, §10-4(d).

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Valle, 405 Ill.App.3d 46, 939 N.E.2d 10, 2010 WL 4230364 (2d Dist. 2010)

If live testimony plays a role in the trial court’s resolution of disputed issues of fact, review of the trial court’s judgment is not *de novo*.

At the hearing on defendant’s motion to suppress his statements, the trial court heard live testimony related to a disputed issue of fact, i.e., defendant’s susceptibility to aggressive or deception interrogation techniques. A full video record existed of defendant’s interrogation sessions. Because the videos did not resolve all disputed issues of fact, deference had to be given to the trial court’s factual findings on the issue of the voluntariness of defendant’s statements.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Wilson, 2012 IL App (1st) 092910 (No. 1-09-2910, 2/9/12)

The court concluded that the “abuse of discretion” standard of review applied to the trial court’s denial of a motion *in limine* to admit evidence of bias and motive to falsify. The evidence consisted of an Independent Police Review Authority investigation of the arresting officers’ conduct during the events leading to the charges against the defendant.

The Appellate Court viewed the trial court’s ruling as merely denying the motion *in limine* concerning the IPRA investigation, but allowing the defense to cross-examine on all relevant manners, including interest or bias based on evidence other than the IPRA records. Rulings on motions *in limine* are generally left to the trial court’s discretion, as are matters involving the admission of evidence. Furthermore, the trial court has discretion to limit the scope of cross-examination.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

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§2-7(b)

Examples

People v. Chapman, 2012 IL 111896 (No. 111896, 3/22/12)

The trial court’s ruling on the admissibility of other crimes evidence will not be

disturbed absent a clear abuse of discretion.

(Defendant was represented by Assistant Defender Bob Burke, Mt. Vernon.)

People v. Radojcic, 2013 IL 114197 (Nos. 114197, 114214, 11/21/13)

At defendant's trial for several offenses related to a mortgage fraud scheme, the trial court determined that the crime-fraud exception to the attorney-client privilege did not apply. In the course of reversing the trial court's holding, the Supreme Court ruled that the *de novo* standard of review applied.

Generally, the abuse of discretion standard applies when reviewing trial court rulings, because the trial court is in a superior position to weigh witness credibility and resolve conflicts in testimony. Because the State offered no live testimony, however, and only introduced transcripts of grand jury testimony, the trial court and reviewing courts were in the same position in evaluating the evidence. Under these circumstances, *de novo review* was appropriate.

(Defendant was represented by Emily Wood of Chicago.)

People v. Taylor, 2011 IL 110067 (No. 110067, 10/6/11)

The admissibility of videotapes and photographs is left to the trial court's discretion. Thus, the "abuse of discretion" standard of review applies to the trial court's decision to admit video recordings. An abuse of discretion occurs when the trial court's ruling is fanciful, unreasonable or such that it would not be adopted by a reasonable person.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Brown, 2014 IL App (2d) 121167 (No. 2-12-1167, 5/30/14)

The issuance of a search warrant is reviewed to determine whether there was a substantial basis for the magistrate to conclude that probable cause existed. Even where the trial court did not hear testimony and there are no facts in dispute, the *de novo* standard of review is not appropriate. Instead, if the complaint for a search warrant provided a substantial basis for the issuing judge to determine that probable cause existed, the denial of a motion to suppress will be affirmed.

(Defendant was represented by Assistant Defender Paul Glaser, Elgin.)

People v. Clark, 2013 IL App (2d) 120034 (No. 2-12-0034, 3/29/13)

The court noted that Illinois law is unclear concerning the standard of review to be applied to the trial court's order requiring that an informant's identity be disclosed. The court declined to resolve the uncertainty, however, finding that under either the abuse of discretion or *de novo* standard of review the trial court's order was erroneous.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Coleman, 2015 IL App (4th) 131045 (No. 4-13-1045, 1/6/15)

In reviewing the denial of post-conviction relief after a third-stage hearing, the court noted that claims of ineffective assistance are considered under a hybrid standard of review in which the Appellate Court defers to the trial court's factual findings but makes an independent determination of the ultimate legal issue.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Davis, 2012 IL App (4th) 110305 (No. 4-11-0305, 3/5/12)

Under most circumstances, the trial court's ruling on a §2-1401 petition is reviewed for

abuse of discretion. However, *de novo* review is appropriate where the petition is based on an interpretation of the Supreme Court Rules or is dismissed without a response by the State and is therefore equivalent to a dismissal for failing to state a cause of action.

Here, the abuse of discretion standard of review applied because neither of the two exceptions listed above applied and because the dispute on appeal concerned a factual issue.

People v. Day, 2011 IL App (2d) 091358 (No. 2-09-1358, revised op. 10/27/11)

The trial court's determination of a schedule for paying restitution is reviewed for abuse of discretion.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

People v. Munoz, 398 Ill.App.3d 455, 923 N.E.2d 898 (1st Dist. 2010)

The trial court's evidentiary rulings on the admissibility of hearsay are reviewed under the "abuse of discretion" standard. (See also **EVIDENCE**, §§19-10(a), 19-20)).

People v. Rubio, 392 Ill.App.3d 914, 911 N.E.2d 1216 (2d Dist. 2009)

1. Noting that the Illinois Supreme Court has found that the "manifest weight of the evidence" standard of review, in which reviewing courts defer to the trial court, is based solely on the trial court's superior position to assess credibility, the Appellate Court concluded that the *de novo* standard of review applies where a trial court finding is based solely on documentary evidence rather than live testimony. Because the trial court's factual rulings appeared to have been based solely on the contents of a video recording of defendant's interrogation, and all defense arguments on appeal concerned matters portrayed in the video, the cause was reviewed *de novo*.

However, applying the *de novo* standard, the Appellate Court affirmed the trial court's ruling that defendant made a knowing waiver of his *Miranda* rights.

2. See also **CONFESSIONS**, §10-4(d).

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Slover, 2011 IL App (4th) 100276 (No. 4-10-0276, 9/9/11)

725 ILCS 5/116-3 authorizes post-conviction forensic testing when several requirements are met, including that the testing has the scientific potential to produce new, noncumulative evidence that is materially relevant to an assertion of actual innocence. Generally, *de novo* review is applied to the trial court's disposition of a §116-3 motion.

The Appellate Court held, however, that *de novo* review was inappropriate where the trial court conducted an evidentiary hearing on the motion and based its ruling in part on its assessment of witness credibility. Finding that review of a §116-3 proceeding in which an evidentiary hearing was held is analogous to review of a third stage post-conviction proceeding, the court held that the same "manifestly erroneous" standard of review should be utilized. The court also noted that in this case the conclusion would be the same under either the "manifestly erroneous" standard or the two-part standard of review urged by the defendant, which would have reviewed the trial court's factual findings under the manifest weight of the evidence standard but applied *de novo* review to the judge's ultimate ruling.

People v. Sullivan, 2011 IL App (4th) 100005 (No. 4-10-0005, 9/21/11)

The trial court's ruling concerning the admissibility of evidence that would impeach the jury's verdict is reviewed for abuse of discretion.

(Defendant was represented by Assistant Defender Michael Delcomyn, Springfield.)

People v. Tolefree, 2011 IL App (1st) 100689 (No. 1-10-0689, 8/12/11)

The standard of review of a defendant's *pro se* post-trial claim of ineffective assistance of counsel depends on whether the trial court determined the merits of defendant's claims. If the court made no determination on the merits, the standard of review is *de novo*. If the court made a determination on the merits, a reviewing court will reverse only if the trial court's decision was manifestly erroneous.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

People v. Valle, 405 Ill.App.3d 46, 939 N.E.2d 10, 2010 WL 4230364 (2d Dist. 2010)

If live testimony plays a role in the trial court's resolution of disputed issues of fact, review of the trial court's judgment is not *de novo*.

At the hearing on defendant's motion to suppress his statements, the trial court heard live testimony related to a disputed issue of fact, i.e., defendant's susceptibility to aggressive or deception interrogation techniques. A full video record existed of defendant's interrogation sessions. Because the videos did not resolve all disputed issues of fact, deference had to be given to the trial court's factual findings on the issue of the voluntariness of defendant's statements.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Wilson, 2012 IL App (1st) 092910 (No. 1-09-2910, 2/9/12)

The court concluded that the "abuse of discretion" standard of review applied to the trial court's denial of a motion *in limine* to admit evidence of bias and motive to falsify. The evidence consisted of an Independent Police Review Authority investigation of the arresting officers' conduct during the events leading to the charges against the defendant.

The Appellate Court viewed the trial court's ruling as merely denying the motion *in limine* concerning the IPRA investigation, but allowing the defense to cross-examine on all relevant manners, including interest or bias based on evidence other than the IPRA records. Rulings on motions *in limine* are generally left to the trial court's discretion, as are matters involving the admission of evidence. Furthermore, the trial court has discretion to limit the scope of cross-examination.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

People v. Wuebbels, ___ Ill.App.3d ___, 919 N.E.2d 1122 (4th Dist. 2009) (No. 4-09-0461, 12/15/09)

De novo review applies where the trial judge "enters a judgment on the pleadings or a dismissal in a §2-1401 proceeding." (See also **COLLATERAL REMEDIES**, §§9-2(a), (k)& **SENTENCING**, §45-9(a)).

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

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